TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

(Including Amendments Effective January 31, 2022)

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Preamble: A Lawyer's Responsibilities

1. A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

2. As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's affairs and reporting about them to the client or to others.

3. In all professional functions, a lawyer should zealously pursue clients' interests within the bounds of the law. In doing so, a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Texas Disciplinary Rules of Professional Conduct or other law.

4. A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

5. As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

6. A lawyer should render public interest legal service. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the

problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees is a moral obligation of each lawyer as well as the profession generally. A lawyer may discharge this basic responsibility by providing public interest legal services without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation, the administration of justice, and by financial support for organizations that provide legal services to persons of limited means.

7. In the nature of law practice, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from apparent conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interests. The Texas Disciplinary Rules of Professional Conduct prescribe terms for resolving such tensions. They do so by stating minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of these Rules many difficult issues of professional discretion can arise. The Rules and their Comments constitute a body of principles upon which the lawyer can rely for guidance in resolving such issues through the exercise of sensitive professional and moral judgment. In applying these rules, lawyers may find interpretive guidance in the principles developed in the Comments.

8. The legal profession has a responsibility to assure that its regulation is undertaken in the public interest rather than in furtherance of parochial or self-interested concerns of the bar, and to insist that every lawyer both comply with its minimum disciplinary standards and aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

9. Each lawyer's own conscience is the touchstone against which to test the extent to which his actions may rise above the disciplinary standards prescribed by these rules. The desire for the respect and confidence of the members of the profession and of the society which it serves provides the lawyer the incentive to attain the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

Preamble: Scope

10. The Texas Disciplinary Rules of Professional Conduct are rules of reason. The Texas Rules of Professional Conduct define proper conduct for purposes of professional discipline. They are imperatives, cast in the terms “shall” or “shall not.” The Comments are cast often in the terms of “may” or “should” and are permissive, defining areas in which the lawyer has professional discretion. When a lawyer exercises such discretion, whether by acting or not acting, no disciplinary action may be taken. The Comments also frequently illustrate or explain applications of the rules, in order to provide guidance for interpreting the rules and for practicing in compliance with the spirit of the rules. The Comments do not, however, add obligations to the rules and no disciplinary action may be taken for failure to conform to the Comments.

11. The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The rules and Comments do not, however, exhaust the moral and ethical considerations that should guide a lawyer, for no worthwhile human activity can be completely defined by legal rules.

12. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. For purposes of determining the lawyer's authority and responsibility, individual circumstances and principles of substantive law external to these rules determine whether a client-lawyer relationship may be found to exist. But there are some duties, such as of that of confidentiality, that may attach before a client-lawyer relationship has been established.

13. The responsibilities of government lawyers, under various legal provisions, including constitutional, statutory and common law, may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These rules do not abrogate any such authority.

14. These rules make no attempt to prescribe either disciplinary procedures or penalties for violation of a rule.

15. These rules do not undertake to define standards of civil liability of lawyers for professional conduct. Violation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached. Likewise, these rules are not designed to be standards for procedural decisions. Furthermore, the purpose of these rules can be abused when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

16. Moreover, these rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. The fact that in exceptional situations the lawyer under the Rules has a

limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

Terminology

"Adjudicatory Official" denotes a person who serves on a Tribunal.

"Adjudicatory Proceeding" denotes the consideration of a matter by a Tribunal.

"Belief" or "Believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Competent" or "Competence" denotes possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.

"Consult" or "Consultation" denotes communication of information and advice reasonably sufficient to permit the client to appreciate the significance of the matter in question.

"Firm" or "Law firm" denotes a lawyer or lawyers in a private firm; or a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a unit of government.

"Fitness" denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.

"Fraud" or "Fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

"Knowingly," "Known," or "Knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Law firm": see "Firm."

"Partner" denotes an individual or corporate member of a partnership or a shareholder in a law firm organized as a professional corporation.

"Person" includes a legal entity as well as an individual.

"Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "Reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

"Should know" when used in reference to a lawyer denotes that a reasonable lawyer under the same or similar circumstances would know the matter in question.

"Substantial" when used in reference to degree or extent denotes a matter of meaningful significance or involvement.

"Tribunal" denotes any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy. "Tribunal" includes such institutions as courts and administrative agencies when engaging in adjudicatory or licensing activities as defined by applicable law or rules of practice or procedure, as well as judges, magistrates, special masters, referees, arbitrators, mediators, hearing officers and comparable persons empowered to resolve or to recommend a resolution of a particular matter; but it does not include jurors, prospective jurors, legislative bodies or their committees, members or staffs, nor does it include other governmental bodies when acting in a legislative or rule-making capacity.

I. CLIENT-LAWYER RELATIONSHIP

Rule 1.01. Competent and Diligent Representation

(a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless:

(1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or

(2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.

(b) In representing a client, a lawyer shall not:

(1) neglect a legal matter entrusted to the lawyer; or

(2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.

(c) As used in this Rule, "neglect" signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients.

Comment:

Accepting Employment

1. A lawyer generally should not accept or continue employment in any area of the law in which the lawyer is not and will not be prepared to render competent legal services. "Competence" is defined in

Terminology as possession of the legal knowledge, skill, and training reasonably necessary for the representation. Competent representation contemplates appropriate application by the lawyer of that legal knowledge, skill and training, reasonable thoroughness in the study and analysis of the law and facts, and reasonable attentiveness to the responsibilities owed to the client.

2. In determining whether a matter is beyond a lawyer's competence, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience in the field in question, the preparation and study the lawyer will be able to give the matter, and whether it is feasible either to refer the matter to or associate a lawyer of established competence in the field in question. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequences.

3. A lawyer may not need to have special training or prior experience to accept employment to handle legal problems of a type with which the lawyer is unfamiliar. Although expertise in a particular field of law may be useful in some circumstances, the appropriate proficiency in many instances is that of a general practitioner. A newly admitted lawyer can be as competent in some matters as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge.

4. A lawyer possessing the normal skill and training reasonably necessary for the representation of a client in an area of law is not subject to discipline for accepting employment in a matter in which, in order to represent the client properly, the lawyer must become more competent in regard to relevant legal knowledge by additional study and investigation. If the additional study and preparation will result in unusual delay or expense to the client, the lawyer should not accept employment except with the informed consent of the client.

5. A lawyer offered employment or employed in a matter beyond the lawyer's competence generally must decline or withdraw from the employment or, with the prior informed consent of the client, associate a lawyer who is competent in the matter. Paragraph (a)(2) permits a lawyer, however, to give advice or assistance in an emergency in a matter even though the lawyer does not have the skill ordinarily required if referral to or consultation with another lawyer would be impractical and if the assistance is limited to that which is reasonably necessary in the circumstances.

Competent and Diligent Representation

6. Having accepted employment, a lawyer should act with competence, commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf. A lawyer should feel a moral or professional obligation to pursue a matter on behalf of a client with reasonable diligence and promptness despite opposition, obstruction or personal inconvenience to the lawyer. A lawyer's workload should be controlled so that each matter can be handled with diligence and competence. As provided in paragraph (a), an incompetent lawyer is subject to discipline.

Neglect

7. Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Under paragraph (b), a lawyer is subject to professional discipline for neglecting a particular legal matter as well as for frequent failures to carry out fully the obligations owed to one or more clients. A lawyer who acts in good faith is not subject to discipline, under those provisions for an isolated inadvertent or unskilled act or omission, tactical error, or error of judgment. Because delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness, there is a duty to communicate reasonably with clients; see Rule 1.03.

Maintaining Competence

8. Because of the vital role of lawyers in the legal process, each lawyer should strive to become and remain proficient and competent in the practice of law, including the benefits and risks associated with relevant technology. To maintain the requisite knowledge and skill of a competent practitioner, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances. Isolated instances of faulty conduct or decision should be identified for purposes of additional study or instruction.

Rule 1.02. Scope and Objectives of Representation

(a) Subject to paragraphs (b), (c), (d), (e), and (f), a lawyer shall abide by a client's decisions:

> (1) concerning the objectives and general methods of representation;
>
> (2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law;
>
> (3) In a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation.

(c) A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning or application of the law.

(d) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the

client from committing the crime or fraud.

(e) When a lawyer has confidential information clearly establishing that the lawyer's client has committed a criminal or fraudulent act in the commission of which the lawyer's services have been used, the lawyer shall make reasonable efforts under the circumstances to persuade the client to take corrective action.

(f) When a lawyer knows that a client expects representation not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Comment:

Scope of Representation

1. Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the objectives to be served by legal representation, within the limits imposed by law, the lawyer's professional obligations, and the agreed scope of representation. Within those limits, a client also has a right to consult with the lawyer about the general methods to be used in pursuing those objectives. The lawyer should assume responsibility for the means by which the client's objectives are best achieved. Thus, a lawyer has very broad discretion to determine technical and legal tactics, subject to the client's wishes regarding such matters as the expense to be incurred and concern for third persons who might be adversely affected.

2. Except where prior communications have made it clear that a particular proposal would be unacceptable to the client, a lawyer is obligated to communicate any settlement offer to the client in a civil case; and a lawyer has a comparable responsibility with respect to a proposed plea bargain in a criminal case.

3. A lawyer should consult with the client concerning any such proposal, and generally it is for the client to decide whether or not to accept it. This principle is subject to several exceptions or qualifications. First, in class actions a lawyer may recommend a settlement of the matter to the court over the objections of named plaintiffs in the case. Second, in insurance defense cases a lawyer's ability to implement an insured client's wishes with respect to settlement may be qualified by the contractual rights of the insurer under its policy. Finally, a lawyer's normal deference to a client's wishes concerning settlement may be abrogated if the client has validly relinquished to a third party any rights to pass upon settlement offers. Whether any such waiver is enforceable is a question largely beyond the scope of these rules. But see comment 5 below. A lawyer reasonably relying on any of these exceptions in not implementing a client's desires concerning settlement is, however, not subject to discipline under this Rule.

Limited Scope of Representation

4. The scope of representation provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may

be for a specifically defined objective. Likewise, representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. Similarly, when a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The scope within which the representation is undertaken also may exclude specific objectives or means, such as those that the lawyer or client regards as repugnant or imprudent.

5. An agreement concerning the scope of representation must accord with the Disciplinary Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.01, or to surrender the right to terminate the lawyer's services or the right to settle or continue litigation that the lawyer might wish to handle differently.

6. Unless the representation is terminated as provided in Rule 1.15, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's representation is limited to a specific matter or matters, the relationship terminates when the matter has been resolved. If a lawyer has represented a client over a substantial period in a variety of matters, the client may sometimes assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice to the contrary. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

Criminal, Fraudulent and Prohibited Transactions

7. A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

8. When a client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer may not reveal the client's wrongdoing, except as permitted or required by Rule 1.05. However, the lawyer also must avoid furthering the client's unlawful purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required. See Rule 1.15(a)(1).

9. Paragraph (c) is violated when a lawyer accepts a general retainer for legal services to an enterprise known to be unlawful. Paragraph (c) does not, however, preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise.

10. The last clause of paragraph (c) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

11. Paragraph (d) requires a lawyer in certain instances to use reasonable efforts to dissuade a client from committing a crime or fraud. If the services of the lawyer were used by the client in committing a crime or fraud, paragraph (e) requires the lawyer to use reasonable efforts to persuade the client to take corrective action.

Rule 1.03. Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment:

1. The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps to permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel either an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Comment 2 to Rule 1.02.

2. Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. Moreover, in certain situations practical exigency may require a lawyer to act for a client without prior consultation. The guiding principle is that the lawyer should reasonably fulfill client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

3. Ordinarily, a lawyer should provide to the client information that would be appropriate for a comprehending and responsible adult. However, communicating such information may be impractical if the client is a child or suffers from diminished capacity; see paragraph 5 and Rule 1.16. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its

members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.12. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

4. In some circumstances, a lawyer may be justified in delaying transmission of information when the lawyer reasonably believes the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. Similarly, rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.04(d) sets forth the lawyer's obligations with respect to such rules or orders. A lawyer may not, however, withhold information to serve the lawyer's own interest or convenience.

Client with Diminished Capacity

5. If a client appears to suffer from diminished capacity, a lawyer should communicate with any legal representative and seek to maintain reasonable communication with the client, insofar as possible. Even if the client suffers from diminished capacity, it may be possible to maintain some aspects of a normal attorney-client relationship. The client may have the ability to understand, deliberate upon, and reach conclusions about some matters affecting the client's own well-being. Children's opinions regarding their own custody are given some weight. Regardless of whether a client suffers from diminished capacity, a client should always be treated with attention and respect. See also Rule 1.16 and Rule 1.05, Comment 17.

Rule 1.04. Fees

(a) A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable.

(b) Factors that may be considered in determining the reasonableness of a fee include, but not to the exclusion of other relevant factors, the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

(c) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(d) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (e) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined. If there is to be a differentiation in the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, the percentage for each shall be stated. The agreement shall state the litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement describing the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(e) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

(f) A division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is:

(i) in proportion to the professional services performed by each lawyer; or

(ii) made between lawyers who assume joint responsibility for the representation; and

(2) the client consents in writing to the terms of the arrangement prior to the time of the association or referral proposed, including:

(i) the identity of all lawyers or law firms who will participate in the fee-sharing agreement, and

(ii) whether fees will be divided based on the proportion of services performed or by

lawyers agreeing to assume joint responsibility for the representation, and

(iii) the share of the fee that each lawyer or law firm will receive or, if the division is based on the proportion of services performed, the basis on which the division will be made; and

(3) the aggregate fee does not violate paragraph (a).

(g) Every agreement that allows a lawyer or law firm to associate other counsel in the representation of a person, or to refer the person to other counsel for such representation, and that results in such an association with or referral to a different law firm or a lawyer in such a different firm, shall be confirmed by an arrangement conforming to paragraph (f). Consent by a client or a prospective client without knowledge of the information specified in subparagraph (f)(2) does not constitute a confirmation within the meaning of this rule. No attorney shall collect or seek to collect fees or expenses in connection with any such agreement that is not confirmed in that way, except for:

(1) the reasonable value of legal services provided to that person; and

(2) the reasonable and necessary expenses actually incurred on behalf of that person.

(h) Paragraph (f) of this rule does not apply to payment to a former partner or associate pursuant to a separation or retirement agreement, or to a lawyer referral program certified by the State Bar of Texas in accordance with the Texas Lawyer Referral Service Quality Act, Tex. Occ. Code 952.001 et seq., or any amendments or recodifications thereof.

Comment:

1. A lawyer in good conscience should not charge or collect more than a reasonable fee, although he may charge less or no fee at all. The determination of the reasonableness of a fee, or of the range of reasonableness, can be a difficult question, and a standard of "reasonableness" is too vague and uncertain to be an appropriate standard in a disciplinary action. For this reason, paragraph (a) adopts, for disciplinary purposes only, a clearer standard: the lawyer is subject to discipline for an illegal fee or an unconscionable fee. Paragraph (a) defines an unconscionable fee in terms of the reasonableness of the fee but in a way to eliminate factual disputes as to the fee's reasonableness. The Rule's "unconscionable" standard, however, does not preclude use of the "reasonableness" standard of paragraph (b) in other settings.

Basis or Rate of Fee

2. When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. If, however, the basis or rate of fee being charged to a regularly represented client differs from the understanding that has evolved, the lawyer should so advise the client. In a new client-lawyer relationship, an understanding as to the fee should be promptly established. It is

not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, in order to identity the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding, and when the lawyer has not regularly represented the client it is preferable for the basis or rate of the fee to be communicated to the client in writing. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth. In the case of a contingent fee, a written agreement is mandatory.

Types of Fees

3. Historically lawyers have determined what fees to charge by a variety of methods. Commonly employed are percentage fees and contingent fees (which may vary in accordance with the amount at stake or recovered), hourly rates, and flat fee arrangements, or combinations thereof.

4. The determination of a proper fee requires consideration of the interests of both client and lawyer. The determination of reasonableness requires consideration of all relevant circumstances, including those stated in paragraph (b). Obviously, in a particular situation not all of the factors listed in paragraph (b) may be relevant and factors not listed could be relevant. The fees of a lawyer will vary according to many factors, including the time required, the lawyer's experience, ability and reputation, the nature of the employment, the responsibility involved, and the results obtained.

5. When there is a doubt whether a particular fee arrangement is consistent with the client's best interest, the lawyer should discuss with the client alternative bases for the fee and explain their implications.

6. Once a fee arrangement is agreed to, a lawyer should not handle the matter so as to further the lawyer's financial interests to the detriment of the client. For example, a lawyer should not abuse a fee arrangement based primarily on hourly charges by using wasteful procedures.

Unconscionable Fees

7. Two principal circumstances combine to make it difficult to determine whether a particular fee is unconscionable within the disciplinary test provided by paragraph (a) of this Rule. The first is the subjectivity of a number of the factors relied on to determine the reasonableness of fees under paragraph (b). Because those factors do not permit more than an approximation of a range of fees that might be found reasonable in any given case, there is a corresponding degree of uncertainty in determining whether a given fee is unconscionable. Secondly, fee arrangements normally are made at the outset of representation, a time when many uncertainties and contingencies exist, while claims of unconscionability are made in hindsight when the contingencies have been resolved. The “unconscionability” standard adopts that difference in perspective and requires that a lawyer be given the benefit of any such uncertainties for disciplinary purposes only. Except in very unusual situations, therefore, the

circumstances at the time a fee arrangement is made should control in determining a question of unconscionability.

8. Two factors in otherwise borderline cases might indicate a fee may be unconscionable. The first is overreaching by a lawyer, particularly of a client who was unusually susceptible to such overreaching. The second is a failure of the lawyer to give at the outset a clear and accurate explanation of how a fee was to be calculated. For example, a fee arrangement negotiated at arm's length with an experienced business client would rarely be subject to question. On the other hand, a fee arrangement with an uneducated or unsophisticated individual having no prior experience in such matters should be more carefully scrutinized for overreaching. While the fact that a client was at a marked disadvantage in bargaining with a lawyer over fees will not make a fee unconscionable, application of the disciplinary test may require some consideration of the personal circumstances of the individuals involved.

Fees in Family Law Matters

9. Contingent and percentage fees in family law matters may tend to promote divorce and may be inconsistent with a lawyer's obligation to encourage reconciliation. Such fee arrangements also may tend to create a conflict of interest between lawyer and client regarding the appraisal of assets obtained for client. See also Rule 1.08(h). In certain family law matters, such as child custody and adoption, no res is created to fund a fee. Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified.

Division of Fees

10. A division of fees is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fees facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring or associating lawyer initially retained by the client and a trial specialist, but it applies in all cases in which two or more lawyers are representing a single client in the same matter, and without regard to whether litigation is involved. Paragraph (f) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes joint responsibility for the representation.

11. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (d) of this Rule.

12. A division of a fee based on the proportion of services rendered by two or more lawyers contemplates that each lawyer is performing substantial legal services on behalf of the client with respect to the matter. In particular, it requires that each lawyer who participates in the fee have performed services beyond those involved in initially seeking to acquire and being engaged by the client. There must be a reasonable correlation between the amount or value of services rendered and responsibility assumed, and the share of the fee to be received. However, if each participating lawyer performs substantial legal services on behalf of the client, the agreed division should control even though the division is not directly

proportional to actual work performed. If a division of fee is to be based on the proportion of services rendered, the arrangement may provide that the allocation not be made until the end of the representation. When the allocation is deferred until the end of the representation, the terms of the arrangement must include the basis by which the division will be made.

13. Joint responsibility for the representation entails ethical and perhaps financial responsibility for the representation. The ethical responsibility assumed requires that a referring or associating lawyer make reasonable efforts to assure adequacy of representation and to provide adequate client communication. Adequacy of representation requires that the referring or associating lawyer conduct a reasonable investigation of the client's legal matter and refer the matter to a lawyer whom the referring or associating lawyer reasonably believes is competent to handle it. See Rule 1.01. Adequate attorney-client communication requires that a referring or associating lawyer monitor the matter throughout the representation and ensure that the client is informed of those matters that come to that lawyer's attention and that a reasonable lawyer would believe the client should be aware. See Rule 1.03. Attending all depositions and hearings or requiring that copies of all pleadings and correspondence be provided a referring or associating lawyer is not necessary in order to meet the monitoring requirement proposed by this rule. These types of activities may increase the transactional costs, which ultimately the client will bear and unless some benefit will be derived by the client, they should be avoided. The monitoring requirement is only that the referring lawyer be reasonably informed of the matter, respond to client questions, and assist the handling lawyer when necessary. Any referral or association of other counsel should be made based solely on the client's best interest.

14. In the aggregate, the minimum activities that must be undertaken by referring or associating lawyers pursuant to an arrangement for a division of fees are substantially greater than those assumed by a lawyer who forwarded a matter to other counsel, undertook no ongoing obligations with respect to it, and yet received a portion of the handling lawyer's fee once the matter was concluded, as was permitted under the prior version of this rule. Whether such activities, or any additional activities that a lawyer might agree to undertake, suffice to make one lawyer participating in such an arrangement responsible for the professional misconduct of another lawyer who is participating in it and, if so, to what extent, are intended to be resolved by Texas Civil Practice and Remedies Code, ch. 33, or other applicable law.

15. A client must consent in writing to the terms of the arrangement prior to the time of the association or referral proposed. For this consent to be effective, the client must have been advised of at least the key features of that arrangement. Those essential terms, which are specified in subparagraph (f)(2), are 1) the identity of all lawyers or law firms who will participate in the fee-sharing agreement, 2) whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation, and 3) the share of the fee that each lawyer or law firm will receive or the basis on which the division will be made if the division is based on proportion of service performed. Consent by a client or prospective client to the referral to or association of other counsel, made prior to any actual such referral or association, but without knowledge of the information specified in subparagraph (f)(2) does not constitute sufficient client confirmation within the meaning of this rule. The referring or associating lawyer or any other lawyer who employs another lawyer to assist in the representation has the primary duty to ensure full disclosure and compliance with this rule.

16. Paragraph (g) facilitates the enforcement of the requirements of paragraph (f). It does so by providing that agreements that authorize an attorney either to refer a person's case to another lawyer, or to associate other counsel in the handling of a client's case, and that actually result in such a referral or association with counsel in a different law firm from the one entering into the agreement, must be confirmed by an arrangement between the person and the lawyers involved that conforms to paragraph (f). As noted there, that arrangement must be presented to and agreed to by the person before the referral or association between the lawyers involved occurs. See subparagraph (f)(2). Because paragraph (g) refers to the party whose matter is involved as a "person" rather than as a "client," it is not possible to evade its requirements by having a referring lawyer not formally enter into an attorney-client relationship with the person involved before referring that person's matter to other counsel. Paragraph (g) does provide, however, for recovery in quantum meruit in instances where its requirements are not met. See subparagraphs (g)(1) and (g)(2).P

17. What should be done with any otherwise agreed-to fee that is forfeited in whole or in part due to a lawyer's failure to comply with paragraph (g) is not resolved by these rules.

18. Subparagraph (f)(3) requires that the aggregate fee charged to clients in connection with a given matter by all of the lawyers involved meet the standards of paragraph (a)--that is, not be unconscionable.

Fee Disputes and Determinations

19. If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by a bar association, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, or when a class or a person is entitled to recover a reasonable attorney's fee as part of the measure of damages. All involved lawyers should comply with any prescribed procedures.

Rule 1.05. Confidentiality of Information

(a) "Confidential information" includes both "privileged information" and "unprivileged client information." "Privileged information" refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates. "Unprivileged client information" means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

(b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly:

(1) Reveal confidential information of a client or a former client to:

(i) a person that the client has instructed is not to receive the information; or

(ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

(2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.

(3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.

(4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.

(c) A lawyer may reveal confidential information:

(1) When the lawyer has been expressly authorized to do so in order to carry out the representation.

(2) When the client consents after consultation.

(3) To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client.

(4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rules of Professional Conduct, or other law.

(5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.

(6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.

(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

(8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

(9) To secure legal advice about the lawyer’s compliance with these Rules.

(10) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from dying by suicide.

(d) A lawyer also may reveal unprivileged client information:

(1) When impliedly authorized to do so in order to carry out the representation.

(2) When the lawyer has reason to believe it is necessary to do so in order to:

(i) carry out the representation effectively;

(ii) defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct;

(iii) respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.

(e) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.

(f) A lawyer shall reveal confidential information when required to do so by Rule 3.03(a)(2), 3.03(b), or by Rule 4.01(b).

Comment:

Confidentiality Generally

1. Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidential information of one who has employed or sought to employ the lawyer. Free discussion should prevail between lawyer and client in order for the lawyer to be fully informed and for the client to obtain the full benefit of the legal system. The ethical obligation of the lawyer to protect the confidential information of the client not only facilitates the proper representation of the client but also encourages potential clients to seek early legal assistance.

2. Subject to the mandatory disclosure requirements of paragraphs (e) and (f) the lawyer generally should be required to maintain confidentiality of information acquired by the lawyer during the course of or by reason of the representation of the client. This principle involves an ethical obligation not to use the

information to the detriment of the client or for the benefit of the lawyer or a third person. In regard to an evaluation of a matter affecting a client for use by a third person, see Rule 2.02.

3. The principle of confidentiality is given effect not only in the Texas Disciplinary Rules of Professional Conduct but also in the law of evidence regarding the attorney-client privilege and in the law of agency. The attorney-client privilege, developed through many decades, provides the client a right to prevent certain confidential communications from being revealed by compulsion of law. Several sound exceptions to confidentiality have been developed in the evidence law of privilege. Exceptions exist in evidence law where the services of the lawyer were sought or used by a client in planning or committing a crime or fraud as well as where issues have arisen as to breach of duty by the lawyer or by the client to the other.

4. Rule 1.05 reinforces the principles of evidence law relating to the attorney-client privilege. Rule 1.05 also furnishes considerable protection to other information falling outside the scope of the privilege. Rule 1.05 extends ethical protection generally to unprivileged information relating to the client or furnished by the client during the course of or by reason of the representation of the client. In this respect Rule 1.05 accords with general fiduciary principles of agency.

5. The requirement of confidentiality applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Disclosure for Benefit of Client

6. A lawyer may be expressly authorized to make disclosures to carry out the representation and generally is recognized as having implied-in-fact authority to make disclosures about a client when appropriate in carrying out the representation to the extent that the client's instructions do not limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion. The effect of Rule 1.05 is to require the lawyer to invoke, for the client, the attorney-client privilege when applicable; but if the court improperly denies the privilege, under paragraph (c)(4) the lawyer may testify as ordered by the court or may test the ruling as permitted by Rule 3.04(d).

7. In the course of a firm's practice, lawyers may disclose to each other and to appropriate employees information relating to a client, unless the client has instructed that particular information be confined to specified lawyers. Sub-paragraphs (b)(1) and (c)(3) continue these practices concerning disclosure of confidential information within the firm.

Use of Information

8. Following sound principles of agency law, subparagraphs (b)(2) and (4) subject a lawyer to discipline for using information relating to the representation in a manner disadvantageous to the client or beneficial to the lawyer or a third person, absent the informed consent of the client. The duty not to misuse client information continues after the client-lawyer relationship has terminated. Therefore, the lawyer is

forbidden by subparagraph (b)(3) to use, in absence of the client's informed consent, confidential information of the former client to the client's disadvantage, unless the information is generally known.

Discretionary Disclosure Adverse to Client

9. In becoming privy to information about a client, a lawyer may foresee that the client intends serious and perhaps irreparable harm. To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of preserving the client's information--usually unprivileged information--even though the client's purpose is wrongful. On the other hand, a client who knows or believes that a lawyer is required or permitted to disclose a client's wrongful purposes may be inhibited from revealing facts which would enable the lawyer to counsel effectively against wrongful action. Rule 1.05 thus involves balancing the interests of one group of potential victims against those of another. The criteria provided by the Rule are discussed below.

10. Rule 503(d)(1), Texas Rules of Civil Evidence (Tex.R.Civ.Evid.), and Rule 503(d)(1), Texas Rules of Criminal Evidence (Tex.R.Crim.Evid.), indicate the underlying public policy of furnishing no protection to client information where the client seeks or uses the services of the lawyer to aid in the commission of a crime or fraud. That public policy governs the dictates of Rule 1.05. Where the client is planning or engaging in criminal or fraudulent conduct or where the culpability of the lawyer's conduct is involved, full protection of client information is not justified.

11. Several other situations must be distinguished. First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.02(c). As noted in the Comment to that Rule, there can be situations where the lawyer may have to reveal information relating to the representation in order to avoid assisting a client's criminal or fraudulent conduct, and sub-paragraph (c)(4) permits doing so. A lawyer's duty under Rule 3.03(a) not to use false or fabricated evidence is a special instance of the duty prescribed in Rule 1.02(c) to avoid assisting a client in criminal or fraudulent conduct, and sub-paragraph (c)(4) permits revealing information necessary to comply with Rule 3.03(a) or (b). The same is true of compliance with Rule 4.01. See also paragraph (f).

12. Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.02(c), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character. Since the lawyer's services were made an instrument of the client's crime or fraud, the lawyer has a legitimate interest both in rectifying the consequences of such conduct and in avoiding charges that the lawyer's participation was culpable. Sub-paragraph (c)(6) and (8) give the lawyer professional discretion to reveal both unprivileged and privileged information in order to serve those interests. See paragraph (g). In view of Tex.R.Civ.Evid. Rule 503(d)(1), and Tex.R.Crim.Evid. 503(d)(1), however, rarely will such information be privileged.

13. Third, the lawyer may learn that a client intends prospective conduct that is criminal or fraudulent. The lawyer's knowledge of the client's purpose may enable the lawyer to prevent commission of the prospective crime or fraud. When the threatened injury is grave, the lawyer's interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information. As stated in

sub-paragraph (c)(7), the lawyer has professional discretion, based on reasonable appearances, to reveal both privileged and unprivileged information in order to prevent the client's commission of any criminal or fraudulent act. In some situations of this sort, disclosure is mandatory. See paragraph (e) and Comments 18-20.

14. The lawyer's exercise of discretion under paragraphs (c) and (d) involves consideration of such factors as the magnitude, proximity, and likelihood of the contemplated wrong, the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the client's conduct in question. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer believes necessary to the purpose. Although preventive action is permitted by paragraphs (c) and (d), failure to take preventive action does not violate those paragraphs. But see paragraphs (e) and (f). Because these rules do not define standards of civil liability of lawyers for professional conduct, paragraphs (c) and (d) do not create a duty on the lawyer to make any disclosure and no civil liability is intended to arise from the failure to make such disclosure.

15. A lawyer entitled to a fee necessarily must be permitted to prove the services rendered in an action to collect it, and this necessity is recognized by sub-paragraphs (c)(5) and (d)(2)(iv). This aspect of the rule, in regard to privileged information, expresses the principle that the beneficiary of a fiduciary relationship may not exploit the relationship to the detriment of the fiduciary. Any disclosure by the lawyer, however, should be as protective of the client's interests as possible.

16. If the client is an organization, a lawyer also should refer to Rule 1.12 in order to determine the appropriate conduct in connection with this Rule.

Client with Diminished Capacity

17. When representing a client who may have diminished capacity, a lawyer should review Rule 1.16, which, under limited circumstances, permits a lawyer to disclose confidential information to protect the client’s interests.

Mandatory Disclosure Adverse to Client

18. Rule 1.05(e) and (f) place upon a lawyer professional obligations in certain situations to make disclosure in order to prevent certain serious crimes by a client or to prevent involvement by the lawyer in a client's crimes or frauds. Except when death or serious bodily harm is likely to result, a lawyer's initial obligation is to attempt to dissuade the client from committing the crime or fraud or to persuade the client to take corrective action; see Rule 1.02(d) and (e).

19. Because it is very difficult for a lawyer to know when a client's criminal or fraudulent purpose actually will be carried out, the lawyer is required by paragraph (e) to act only if the lawyer has information “clearly establishing” the likelihood of such acts and consequences. If the information shows clearly that the client's contemplated crime or fraud is likely to result in death or serious injury, the lawyer must seek to

avoid those lamentable results by revealing information necessary to prevent the criminal or fraudulent act. When the threatened crime or fraud is likely to have the less serious result of substantial injury to the financial interests or property of another, the lawyer is not required to reveal preventive information but may do so in conformity to paragraph (c)(7). See also paragraph (f); Rule 1.02(d) and (e); and Rule 3.03(b) and (c).

20. Although a violation of paragraph (e) will subject a lawyer to disciplinary action, the lawyer's decisions whether or how to act should not constitute grounds for discipline unless the lawyer's conduct in the light of those decisions was unreasonable under all existing circumstances as they reasonably appeared to the lawyer. This construction necessarily follows from the fact that paragraph (e) bases the lawyer's affirmative duty to act on how the situation "reasonably appears" to the lawyer, while that imposed by paragraph (f) arises only when a lawyer "knows" that the lawyer's services have been misused by the client. See also Rule 3.03(b).

Withdrawal

21. If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.15(a)(1). After withdrawal, a lawyer's conduct continues to be governed by Rule 1.05. The lawyer's duties of mandatory disclosure under paragraph (e) are not affected by termination of the relationship. If disclosure during the relationship was permissive, disclosure thereafter remains permissive under paragraphs (6), (7), and (8) if the further requirements of such paragraph are met. Neither this Rule nor Rule 1.15 prevents the lawyer from giving notice of the fact of withdrawal, and no rule forbids the lawyer to withdraw or disaffirm any opinion, document, affirmation, or the like.

Other Rules

22. Various other Texas Disciplinary Rules of Professional Conduct permit or require a lawyer to disclose information relating to the representation. See Rules 1.07, 1.12, 1.16, 2.02, 3.03 and 4.01. In addition to these provisions, a lawyer may be obligated by other provisions of statutes or other law to give information about a client. Whether another provision of law supersedes Rule 1.05 is a matter of interpretation beyond the scope of these Rules, but sub-paragraph (c)(4) protects the lawyer from discipline who acts on reasonable belief as to the effect of such laws.

Permitted Disclosure or Use When the Lawyer Seeks Legal Advice

23. A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's responsibility to comply with these Rules. In most situations, disclosing or using confidential information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure or use is not impliedly authorized, subparagraph (c)(9) allows such disclosure or use because of the importance of a lawyer's compliance with these Rules. A lawyer who receives confidential information for the purpose of rendering legal advice to another lawyer or law firm under this Rule is subject to the same rules of conduct regarding disclosure or use of

confidential information received in a confidential relationship.

Rule 1.06. Conflict of Interest: General Rule

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

> (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
>
> (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

> (1) the lawyer reasonably believes the representation of each client will not be materially affected; and
>
> (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

Comment:

Loyalty to a Client

1. Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer must take effective

action to eliminate the conflict, including withdrawal if necessary to rectify the situation. See also Rule 1.16. When more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by this Rule and Rules 1.05 and 1.09. See also Rule 1.07(c). Under this Rule, any conflict that prevents a particular lawyer from undertaking or continuing a representation of a client also prevents any other lawyer who is or becomes a member of or an associate with that lawyer's firm from doing so. See paragraph (f).

2. A fundamental principle recognized by paragraph (a) is that a lawyer may not represent opposing parties in litigation. The term "opposing parties" as used in this Rule contemplates a situation where a judgment favorable to one of the parties will directly impact unfavorably upon the other party. Moreover, as a general proposition loyalty to a client prohibits undertaking representation directly adverse to the representation of that client in a substantially related matter unless that client's fully informed consent is obtained and unless the lawyer reasonably believes that the lawyer's representation will be reasonably protective of that client's interests. Paragraphs (b) and (c) express that general concept.

Conflicts in Litigation

3. Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation are not actually directly adverse but where the potential for conflict exists, such as co-plaintiffs or co-defendants, is governed by paragraph (b). An impermissible conflict may exist or develop by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 1.07 involving intermediation between clients.

Conflict with Lawyer's Own Interests

4. Loyalty to a client is impaired not only by the representation of opposing parties in situations within paragraphs (a) and (b)(1) but also in any situation when a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyer's own interests or responsibilities to others. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b)(2) addresses such situations. A potential possible conflict does not itself necessarily preclude the representation. The critical questions are the likelihood that a conflict exists or will eventuate and, if it does, whether it will materially and adversely affect the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. It is for the client to decide whether the client wishes to accommodate the other interest involved. However, the client's consent to the representation by the lawyer of another whose interests are directly adverse is insufficient unless the lawyer also believes that there will be no

materially adverse effect upon the interests of either client. See paragraph (c).

5. The lawyer's own interests should not be permitted to have adverse effect on representation of a client, even where paragraph (b)(2) is not violated. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.01 and 1.04. If the probity of a lawyer's own conduct in a transaction is in question, it may be difficult for the lawyer to give a client detached advice. A lawyer should not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Meaning of Directly Adverse

6. Within the meaning of Rule 1.06(b), the representation of one client is "directly adverse" to the representation of another client if the lawyer's independent judgment on behalf of a client or the lawyer's ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer's representation of, or responsibilities to, the other client. The dual representation also is directly adverse if the lawyer reasonably appears to be called upon to espouse adverse positions in the same matter or a related matter. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not constitute the representation of directly adverse interests. Even when neither paragraph (a) nor (b) is applicable, a lawyer should realize that a business rivalry or personal differences between two clients or potential clients may be so important to one or both that one or the other would consider it contrary to its interests to have the same lawyer as its rival even in unrelated matters; and in those situations a wise lawyer would forego the dual representation.

Full Disclosure and Informed Consent

7. A client under some circumstances may consent to representation notwithstanding a conflict or potential conflict. However, as indicated in paragraph (c)(1), when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved should not ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the full disclosure necessary to obtain informed consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

8. Disclosure and consent are not formalities. Disclosure sufficient for sophisticated clients may not be sufficient to permit less sophisticated clients to provide fully informed consent. While it is not required that the disclosure and consent be in writing, it would be prudent for the lawyer to provide potential dual clients with at least a written summary of the considerations disclosed.

9. In certain situations, such as in the preparation of loan papers or the preparation of a partnership

agreement, a lawyer might have properly undertaken multiple representation and be confronted subsequently by a dispute among those clients in regard to that matter. Paragraph (d) forbids the representation of any of those parties in regard to that dispute unless informed consent is obtained from all of the parties to the dispute who had been represented by the lawyer in that matter.

10. A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

11. Ordinarily, it is not advisable for a lawyer to act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated and even if paragraphs (a), (b), and (d) are not applicable. However, there are circumstances in which a lawyer may act as advocate against a client, for a lawyer is free to do so unless this Rule or another rule of the Texas Disciplinary Rules of Professional Conduct would be violated. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in a matter unrelated to any matter being handled for the enterprise if the representation of one client is not directly adverse to the representation of the other client. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for declaratory judgment concerning statutory interpretation.

Interest of Person Paying for a Lawyer's Service

12. A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.08(e). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Non-litigation Conflict Situations

13. Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

14. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation may be permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

15. Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration it may be unclear whether the client is the fiduciary or is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

16. A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict Charged by an Opposing Party

17. Raising questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with great caution, however, for it can be misused as a technique of harassment. See Preamble: Scope.

18. Except when the absolute prohibition of this rule applies or in litigation when a court passes upon issues of conflicting interests in determining a question of disqualification of counsel, resolving questions of conflict of interests may require decisions by all affected clients as well as by the lawyer.

Imputed Conflicts, Nonlawyer Employees, and Lawyers Formerly Employed in a Nonlawyer Role

19. A law firm is not prohibited from representing a client under paragraph (f) merely because a nonlawyer employee of the firm, such as a paralegal or legal secretary, has a conflict of interest arising from prior employment or some other source. Nor is a firm prohibited from representing a client merely because a lawyer of the firm has a conflict of interest arising from events that occurred before the person became a lawyer, such as work that the person did as a law clerk or intern. But the firm must ordinarily screen the person with the conflict from any personal participation in the matter to prevent the person's communicating to others in the firm confidential information that the person and the firm have a legal duty to protect. *See* Rule 5.03; *see also* MODEL RULES PROF' L CONDUCT r. 1.10 cmt. 4 (AM. BAR ASS'N 1983); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 cmt. f (AM. LAW INST. 2000).

Rule 1.07. Conflict of Interest: Intermediary

(a) A lawyer shall not act as intermediary between clients unless:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's written consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved without the necessity of contested litigation on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decision to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

(d) Within the meaning of this Rule, a lawyer acts as intermediary if the lawyer represents two or more parties with potentially conflicting interests.

(e) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer's firm may engage in that conduct.

Comment:

1. A lawyer acting as intermediary may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis. For example, the lawyer may assist in organizing a business in which two or more clients are entrepreneurs, in working out the financial reorganization of an enterprise in which two or more clients have an interest, in arranging a property distribution in settlement of an estate or in mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

2. Because confusion can arise as to the lawyer's role where each party is not separately represented, it is

important that the lawyer make clear the relationship; hence, the requirement of written consent. Moreover, a lawyer should not permit his personal interests to influence his advice relative to a suggestion by his client that additional counsel be employed. See also Rule 1.06(b).

3. The Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint Committee of the American Bar Association and the American Arbitration Association.

4. In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment and recrimination. In some situations, the risk of failure is so great that intermediation is plainly impossible. Moreover, a lawyer cannot undertake common representation of clients between whom contested litigation is reasonably expected or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

5. The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration, where each client's case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the clients' interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

Confidentiality and Privilege

6. A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation, except as to such clients. See Rules 1.03 and 1.05. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the general rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

7. Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

Consultation

8. In acting as intermediary between clients, the lawyer should consult with the clients on the implications of doing so, and proceed only upon informed consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances.

9. Paragraph (b) is an application of the principle expressed in Rule 1.03. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

10. Under this Rule, any condition or circumstance that prevents a particular lawyer either from acting as intermediary between clients, or from representing those clients individually in connection with a matter after an unsuccessful intermediation, also prevents any other lawyer who is or becomes a member of or associates with that lawyer's firm from doing so. See paragraphs (c) and (e).

Withdrawal

11. In the event of withdrawal by one or more parties from the enterprise, the lawyer may continue to act for the remaining parties and the enterprise. See also Rule 1.06(c)(2) which authorizes continuation of the representation with consent.

Rule 1.08. Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client unless:

> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in a manner which can be reasonably understood by the client;
>
> (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
>
> (3) the client consents in writing thereto.

(b) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as a parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(c) Prior to the conclusion of all aspects of the matter giving rise to the lawyer's employment, a lawyer shall not make or negotiate an agreement with a client, prospective client, or former client giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:

(1) a lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(e) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.05.

(f) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement to guilty or nolo contendere pleas, unless each client has consented after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the nature and extent of the participation of each person in the settlement.

(g) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(h) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract in a civil case with a client for a contingent fee that is permissible under Rule 1.04.

(i) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer's firm may engage in that conduct.

(j) As used in this Rule, “business transactions” does not include standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others.

Comment:

Transactions between Client and Lawyer

1. This rule deals with certain transactions that per se involve unacceptable conflicts of interests.

2. As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others such as banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

3. A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (b) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Literary Rights

4. An agreement by which a lawyer acquires literary or media rights concerning the conduct of representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (c) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.04 and to paragraph (h) of this Rule.

Person Paying for Lawyer's Services

5. Paragraph (e) requires disclosure to the client of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.05 concerning confidentiality and Rule 1.06 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure. Where an insurance company pays the lawyer's fee for representing an insured, normally the insured has consented to the arrangement by the terms of the insurance contract.

Prospectively Limiting Liability

6. Paragraph (g) is not intended to apply to customary qualification and limitations in legal opinions and memoranda.

Acquisition of Interest in Litigation

7. This Rule embodies the traditional general precept that lawyers are prohibited from acquiring a proprietary interest in the subject matter of litigation. This general precept, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for contingent fees set forth in Rule 1.04 and the exception for certain advances of the costs of litigation set forth in paragraph (d). A special instance arises when a lawyer proposes to incur litigation or other expenses with an entity in which the lawyer has a pecuniary interest. A lawyer should not incur such expenses unless the client has entered into a written agreement complying with paragraph (a) that contains a full disclosure of the nature and amount of the possible expenses and the relationship between the lawyer and the other entity involved.

Imputed Disqualifications

8. The prohibitions imposed on an individual lawyer by this Rule are imposed by paragraph (i) upon all other lawyers while practicing with that lawyer's firm.

Rule 1.09. Conflict of Interest: Former Client

(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

(1) in which such other person questions the validity of the lawyer's services or work product for the former client;

(2) if the representation in reasonable probability will involve a violation of Rule 1.05; or

(3) if it is the same or a substantially related matter.

(b) Except to the extent authorized by Rule 1.10, when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).

(c) When the association of a lawyer with a firm has terminated, the lawyers who were then associated with that lawyer shall not knowingly represent a client if the lawyer whose association with that firm has terminated would be prohibited from doing so by paragraph (a)(1) or if the representation in reasonable probability will involve a violation of Rule 1.05.

Comment:

1. Rule 1.09 addresses the circumstances in which a lawyer in private practice, and other lawyers who were, are or become members of or associated with a firm in which that lawyer practiced or practices, may represent a client against a former client of that lawyer or the lawyer's former firm. Whether a lawyer,

or that lawyer's present or former firm, is prohibited from representing a client in a matter by reason of the lawyer's successive government and private employment is governed by Rule 1.10 rather than by this Rule.

2. Paragraph (a) concerns the situation where a lawyer once personally represented a client and now wishes to represent a second client against that former client. Whether such a personal attorney-client relationship existed involves questions of both fact and law that are beyond the scope of these Rules. See Preamble: Scope. Among the relevant factors, however, would be how the former representation actually was conducted within the firm; the nature and scope of the former client's contacts with the firm (including any restrictions the client may have placed on the dissemination of confidential information within the firm); and the size of the firm.

3. Although paragraph (a) does not absolutely prohibit a lawyer from representing a client against a former client, it does provide that the latter representation is improper if any of three circumstances exists, except with prior consent. The first circumstance is that the lawyer may not represent a client who questions the validity of the lawyer's services or work product for the former client. Thus, for example, a lawyer who drew a will leaving a substantial portion of the testator's property to a designated beneficiary would violate paragraph (a) by representing the testator's heirs at law in an action seeking to overturn the will.

4. Paragraph (a)'s second limitation on undertaking a representation against a former client is that it may not be done if there is a "reasonable probability" that the representation would cause the lawyer to violate the obligations owed the former client under Rule 1.05. Thus, for example, if there were a reasonable probability that the subsequent representation would involve either an unauthorized disclosure of confidential information under Rule 1.05(b)(1) or an improper use of such information to the disadvantage of the former client under Rule 1.05(b)(3), that representation would be improper under paragraph (a). Whether such a reasonable probability exists in any given case will be a question of fact.

4A. The third situation where representation adverse to a former client is prohibited is where the representation involved the same or a substantially related matter. The "same" matter aspect of this prohibition prevents a lawyer from switching sides and representing a party whose interests are adverse to a person who disclosed confidences to the lawyer while seeking in good faith to retain the lawyer. The prohibition applies when an actual attorney-client relationship was established even if the lawyer withdrew from the representation before the client had disclosed any confidential information. This aspect of the prohibition includes, but is somewhat broader than, that contained in paragraph (a)(1) of this Rule.

4B. The "substantially related" aspect, on the other hand, has a different focus. Although that term is not defined in the Rule, it primarily involves situations where a lawyer could have acquired confidential information concerning a prior client that could be used either to that prior client's disadvantage or for the advantage of the lawyer's current client or some other person. It thus largely overlaps the prohibition contained in paragraph (a)(2) of this Rule.

5. Paragraph (b) extends paragraph (a)'s limitations on an individual lawyer's freedom to undertake a

representation against that lawyer's former client to all other lawyers who are or become members of or associated with the firm in which that lawyer is practicing. Thus, for example, if a client severs the attorney-client relationship with a lawyer who remains in a firm, the entitlement of that individual lawyer to undertake a representation against that former client is governed by paragraph (a); and all other lawyers who are or become members of or associated with that lawyer's firm are treated in the same manner by paragraph (b). Similarly, if a lawyer severs his or her association with a firm and that firm retains as a client a person whom the lawyer personally represented while with the firm, that lawyer's ability thereafter to undertake a representation against that client is governed by paragraph (a); and all other lawyers who are or become members of or associates with that lawyer's new firm are treated in the same manner by paragraph (b). See also paragraph 19 of the comment to Rule 1.06.

6. Paragraph (c) addresses the situation of former partners or associates of a lawyer who once had represented a client when the relationship between the former partners or associates and the lawyer has been terminated. In that situation, the former partners or associates are prohibited from questioning the validity of such lawyer's work product and from undertaking representation which in reasonable probability will involve a violation of Rule 1.05. Such a violation could occur, for example, when the former partners or associates retained materials in their files from the earlier representation of the client that, if disclosed or used in connection with the subsequent representation, would violate Rule 1.05(b)(1) or (b)(3).

7. Thus, the effect of paragraph (b) is to extend any inability of a particular lawyer under paragraph (a) to undertake a representation against a former client to all other lawyers who are or become members of or associated with any firm in which that lawyer is practicing. If, on the other hand, a lawyer disqualified by paragraph (a) should leave a firm, paragraph (c) prohibits lawyers remaining in that firm from undertaking a representation that would be forbidden to the departed lawyer only if that representation would violate subparagraphs (a)(1) or (a)(2). Finally, should those other lawyers cease to be members of the same firm as the lawyer affected by paragraph (a) without personally coming within its restrictions, they thereafter may undertake the representation against the lawyer's former client unless prevented from doing so by some other of these Rules.

8. Although not required to do so by Rule 1.05 or this Rule, some courts, as a procedural decision, disqualify a lawyer for representing a present client against a former client when the subject matter of the present representation is so closely related to the subject matter of the prior representation that confidences obtained from the former client might be useful in the representation of the present client. See Comment 17 to Rule 1.06. This so-called "substantial relationship" test is defended by asserting that to require a showing that confidences of the first client were in fact used for the benefit of the subsequent client as a condition to procedural disqualification would cause disclosure of the confidences that the court seeks to protect. A lawyer is not subject to discipline under Rule 1.05(b)(1), (3), or (4), however, unless the protected information is actually used. Likewise, a lawyer is not subject to discipline under this Rule unless the new representation by the lawyer in reasonable probability would result in a violation of those provisions.

9. Whether the "substantial relationship" test will continue to be employed as a standard for procedural

disqualification is a matter beyond the scope of these Rules. See Preamble: Scope. The possibility that such a disqualification might be sought by the former client or granted by a court, however, is a matter that could be of substantial importance to the present client in deciding whether or not to retain or continue to employ a particular lawyer or law firm as its counsel. Consequently, a lawyer should disclose those possibilities, as well as their potential consequences for the representation, to the present client as soon as the lawyer becomes aware of them; and the client then should be allowed to decide whether or not to obtain new counsel. See Rules 1.03(b) and 1.06(b).

10. This Rule is primarily for the protection of clients and its protections can be waived by them. A waiver is effective only if there is consent after disclosure of the relevant circumstances, including the lawyer's past or intended role on behalf of each client, as appropriate. See Comments 7 and 8 to Rule 1.06.

Rule 1.10. Successive Government and Private Employment

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation.

(b) No lawyer in a firm with which a lawyer subject to paragraph (a) is associated may knowingly undertake or continue representation in such a matter unless:

> (1) The lawyer subject to paragraph (a) is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> (2) written notice is given with reasonable promptness to the appropriate government agency.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows or should know is confidential government information about a person or other legal entity acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person or legal entity.

(d) After learning that a lawyer in the firm is subject to paragraph (c) with respect to a particular matter, a firm may undertake or continue representation in that matter only if that disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(e) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

> (1) Participate in a matter involving a private client when the lawyer had represented that client in the same matter while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

(f) As used in this rule, the term "matter" does not include regulation-making or rule-making proceedings or assignments, but includes:

(1) Any adjudicatory proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge accusation, arrest or other similar, particular transaction involving a specific party or parties; and

(2) any other action or transaction covered by the conflict of interest rules of the appropriate government agency.

(g) As used in this rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

(h) As used in this Rule, "Private Client" includes not only a private party but also a governmental agency if the lawyer is not a public officer or employee of that agency.

(i) A lawyer who serves as a public officer or employee of one body politic after having served as a public officer of another body politic shall comply with paragraphs (a) and (c) as if the second body politic were a private client and with paragraph (e) as if the first body politic were a private client.

Comment:

1. This Rule prevents a lawyer from exploiting public office for the advantage of a private client.

2. A lawyer licensed or specially admitted in Texas and representing a government agency is subject to the Texas Disciplinary Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.06 and the protections afforded former clients in Rule 1.09. In addition, such a lawyer is subject to this Rule and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under paragraph (a) of this Rule.

3. Where a public agency and a private client are represented in succession by a lawyer, the risk exists that power or discretion vested in public authority might be used for the special benefit of the private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently

or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to avoid imposing too severe a deterrent against entering public service. Although "screening" is not defined, the screening provisions contemplate that the screened lawyer has not furnished and will not furnish other lawyers with information relating to the matter, will not have access to the files pertaining to the matter, and will not participate in any way as a lawyer or adviser in the matter.

4. When the client of a lawyer in private practice is an agency of one government, that agency is a private client for purposes of this Rule. See paragraph (h). If the lawyer thereafter becomes an officer or employee of an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency, the lawyer is subject to paragraph (e). A lawyer who has been a public officer or employee of one body politic and who becomes a public officer or employee of another body politic is subject to paragraphs (a), (c) and (e). See paragraph (i). Thus, paragraph (i) protects a governmental agency without regard to whether the lawyer was or becomes a private practitioner or a public officer or employee.

5. Paragraphs (b)(1) and (d)(1) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

6. Paragraph (b)(2) does not require that a lawyer give notice to the governmental agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency or affected person will have a reasonable opportunity to ascertain compliance with Rule 1.10 and to take appropriate action if necessary.

7. Paragraph (c) operates only when the lawyer in question has actual as opposed to imputed knowledge of the confidential government information.

8. Paragraphs (a) and (e) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.06 and is not otherwise prohibited by law.

9. Paragraph (e)(1) does not disqualify other lawyers in the agency with which the lawyer in question has become associated. Although the rule does not require that the lawyer in question be screened from participation in the matter, the sound practice would be to screen the lawyer to the extent feasible. In any event, the lawyer in question must comply with Rule 1.05.

10. As used in paragraph (i), "one body politic" refers to one unit or level of government such as the federal government, a state government, a county, a city or a precinct. The term does not refer to different agencies within the same body politic or unit of government.

Rule 1.11. Adjudicatory Official or Law Clerk

(a) A lawyer shall not represent anyone in connection with a matter in which the lawyer has passed upon the merits or otherwise participated personally and substantially as an adjudicatory official or law clerk to an adjudicatory official, unless all parties to the proceeding consent after disclosure.

(b) A lawyer who is an adjudicatory official shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a pending matter in which that official is participating personally and substantially. A lawyer serving as a law clerk to an adjudicatory official may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the clerk has notified the adjudicatory official.

(c) If paragraph (a) is applicable to a lawyer, no other lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the lawyer who is subject to paragraph (a) is screened from participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the other parties to the proceeding.

Comment:

1. This Rule generally parallels Rule 1.10. The term "personally and substantially" signifies that a judge who was a member of a multi-member court and thereafter left judicial office to practice law is not prohibited from representing a client in a matter pending in the court but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in matters where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comments to Rule 1.10.

2. The term "Adjudicatory Official" includes not only judges but also comparable officials serving on tribunals, such as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, as well as lawyers who serve as part-time judges. Compliance provisions B(2) and C of the Texas Code of Judicial Conduct provide that a part-time judge or judge pro tempore may not "act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto." Although phrased differently from this rule, those provisions correspond in meaning.

3. Some law clerks have not been licensed as lawyers at the time they commence service as law clerks. Obviously, paragraph (b) cannot apply to a law clerk until the clerk has been licensed as a lawyer. Paragraph (a) applies, however, to a lawyer without regard to whether the lawyer had been licensed at the time of the service as a law clerk, and once that law clerk is licensed as a lawyer and joins a firm, paragraph (c) applies to the firm.

4. Paragraph (c) does not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. It prohibits directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

Rule 1.12. Organization as a Client

(a) A lawyer employed or retained by an organization represents the entity. While the lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity's duly authorized constituents, in the situations described in paragraph (b) the lawyer shall proceed as reasonably necessary in the best interest of the organization without involving unreasonable risks of disrupting the organization and of revealing information relating to the representation to persons outside the organization.

(b) A lawyer representing an organization must take reasonable remedial actions whenever the lawyer learns or knows that:

(1) an officer, employee, or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization;

(2) the violation is likely to result in substantial injury to the organization; and

(3) the violation is related to a matter within the scope of the lawyer's representation of the organization.

(c) Except where prior disclosure to persons outside the organization is required by law or other Rules, a lawyer shall first attempt to resolve a violation by taking measures within the organization. In determining the internal procedures, actions or measures that are reasonably necessary in order to comply with paragraphs (a) and (b), a lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Such procedures, actions and measures may include, but are not limited to, the following:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(d) Upon a lawyer's resignation or termination of the relationship in compliance with Rule 1.15, a lawyer is excused from further proceeding as required by paragraphs (a), (b) and (c), and any further obligations of the lawyer are determined by Rule 1.05.

(e) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing or when explanation appears reasonably necessary to avoid misunderstanding on their part.

Comment:

The Entity as the Client

1. A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. Unlike individual clients who can speak and decide finally and authoritatively for themselves, an organization can speak and decide only through its agents or constituents such as its officers or employees. In effect, the lawyer-client relationship must be maintained through a constituent who acts as an intermediary between the organizational client and the lawyer. This fact requires the lawyer under certain conditions to be concerned whether the intermediary legitimately represents the organizational client.

2. As used in this Rule, the constituents of an organizational client, whether incorporated or an unincorporated association, include its directors, officers, employees, shareholders, members, and others serving in capacities similar to those positions or capacities. This Rule applies not only to lawyers representing corporations but to those representing an organization, such as an unincorporated association, union, or other entity.

3. When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.05. Thus, by way of example, if an officer of an organizational client requests its lawyers to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.05. The lawyer may not disclose to such constituents information relating to the representation except for disclosures permitted by Rule 1.05.

Clarifying the Lawyer's Role

4. There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyers should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care should be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual

may not be privileged insofar as that individual is concerned. Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

5. A lawyer representing an organization may, of course, also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.06. If the organization's consent to the dual representation is required by Rule 1.06, the consent of the organization should be given by the appropriate official or officials of the organization other than the individual who is to be represented, or by the shareholders.

Decisions by Constituents

6. When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows, in regard to a matter within the scope of the lawyer's responsibility, that the organization is likely to be substantially injured by the action of a constituent that is in violation of law or in violation of a legal obligation to the organization. In such circumstances, the lawyer must take reasonable remedial measure. See paragraph (b). It may be reasonably necessary, for example, for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. At some point it may be useful or essential to obtain an independent legal opinion.

7. In some cases, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest responsible authority. See paragraph (c)(3). Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere, such as in the independent directors of a corporation. Even that step may be unsuccessful. The ultimate and difficult ethical question is whether the lawyer should circumvent the organization's highest authority when it persists in a course of action that is clearly violative of law or of a legal obligation to the organization and is likely to result in substantial injury to the organization. These situations are governed by Rule 1.05; see paragraph (d) of this Rule. If the lawyer does not violate a provision of Rule 1.02 or Rule 1.05 by doing so, the lawyer's further remedial action, after exhausting remedies within the organization, may include revealing information relating to the representation to persons outside the organization. If the conduct of the constituent of the organization is likely to result in death or serious bodily injury to another, the lawyer may have a duty of revelation under Rule 1.05(e). The lawyer may resign, of course, in accordance with Rule 1.15, in which event the lawyer is excused from further proceeding as required by paragraphs (a), (b), and (c), and any further obligations are determined by Rule 1.05.

Relation to Other Rules

8. The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule is consistent with the lawyer's responsibility under Rules 1.05, 1.08, 1.15, 3.03, and 4.01. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.02(c) can be applicable.

Government Agency

9. The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See Preamble: Scope.

Derivative Actions

10. Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

11. The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with those managing or controlling its affairs.

Rule 1.13. Conflicts: Public Interests Activities

A lawyer serving as a director, officer or member of a legal services, civic, charitable or law reform organization, apart from the law firm in which the lawyer practices, shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision would violate the lawyer's obligations to a client under Rule 1.06; or

(b) where the decision could have a material adverse effect on the representation of any client of the organization whose interests are adverse to a client of the lawyer.

Comment:

1. Lawyers are encouraged to serve as directors, officers or members of legal services, civic, charitable or law reform organizations, and, with two exceptions, they may do so notwithstanding that the organization either itself has interests adverse to a client of the lawyer or else serves persons having such adverse interests.

2. When the lawyer is a director, officer or member of a legal services organization, further problems can arise when a client served by the organization has interests adverse to those of a client served by the lawyer. A lawyer-client relationship with persons served by the organization does not result solely from the lawyer's service in those capacities. Nonetheless, if the lawyer were to participate in an action or decision of the organization concerning that representation, a real danger of having this quality of the organizational client's representation being dictated by its adversary would be presented. To avoid that possibility, paragraph (b) prohibits a lawyer's participation in actions or decisions of the organization that could have a material adverse effect on the representation of any client of the organization, if that client's interests are adverse to those of a client of the lawyer.

3. Law reform organizations (like civic and charitable organizations) generally do not have clients, in which event paragraph (b) does not apply. For reasons of public policy, it is not generally considered a conflict of interest for a lawyer to engage in law reform activities even though such activities are adverse to the interests of the lawyer's private clients. A lawyer's representation of a client does not constitute an endorsement of the client's political, economic, social or moral views, nor does he forego his own. When the lawyer knows that the interests of a client may be materially benefitted by a law reform decision in which the lawyer participates, the lawyer should disclose that fact but need not identify the client.

Rule 1.14. Safekeeping Property

(a) A lawyer shall hold funds and other property belonging in whole or in part to clients or third persons that are in a lawyer's possession in connection with a representation separate from the lawyer's own property. Such funds shall be kept in a separate account, designated as a “trust” or “escrow” account, maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other client property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or

third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of funds or other property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interest. All funds in a trust or escrow account shall be disbursed only to those persons entitled to receive them by virtue of the representation or by law. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separated by the lawyer until the dispute is resolved, and the undisputed portion shall be distributed appropriately.

Comment:

1. A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. Paragraph (a) requires that complete records of the funds and other property be maintained.

2. Lawyers often receive funds from third parties from which the lawyer's fee will be paid. These funds should be deposited into a lawyer's trust account. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed to those entitled to receive them by virtue of the representation. A lawyer should not use even that portion of trust account funds due to the lawyer to make direct payment to general creditors of the lawyer of the lawyer's firm, because such a course of dealing increases the risk that all the assets of that account will be viewed as the lawyer's property rather than that of clients, and thus as available to satisfy the claims of such creditors. When a lawyer receives from a client monies that constitute a prepayment of a fee and that belongs to the client until the services are rendered, the lawyer should handle the fund in accordance with paragraph (c). After advising the client that the service has been rendered and the fee earned, and in the absence of a dispute, the lawyer may withdraw the fund from the separate account. Paragraph (c) does not prohibit participation in an IOLTA or similar program.

3. Third parties, such as client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

4. The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal service. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

5. The "client security fund" in Texas provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer.

Rule 1.15. Declining or Terminating Representation

(a) A lawyer shall decline to represent a client or, where representation has commenced, shall withdraw, except as stated in paragraph (c), from the representation of a client, if:

(1) the representation will result in violation of Rule 3.08, other applicable rules of professional conduct or other law;

(2) the lawyer's physical, mental or psychological condition materially impairs the lawyer's fitness to represent the client; or

(3) the lawyer is discharged, with or without good cause.

(b) Except as required by paragraph (a), a lawyer shall not withdraw from representing a client unless:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes may be criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services, including an obligation to pay the lawyer's fee as agreed, and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment

of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.

Comment:

1. A lawyer should not accept representation in a matter unless it can be performed competently, promptly, and without improper conflict of interest. See generally Rules 1.01, 1.06, 1.07, 1.08, and 1.09. Having accepted the representation, a lawyer normally should endeavor to handle the matter to completion. Nevertheless, in certain situations the lawyer must terminate the representation and in certain other situations the lawyer is permitted to withdraw.

Mandatory Withdrawal

2. A lawyer ordinarily must decline employment if the employment will cause the lawyer to engage in conduct that the lawyer knows is illegal or that violates the Texas Disciplinary Rules of Professional Conduct. Rule 1.15(a)(1); cf. Rules 1.02(c), 3.01, 3.02, 3.03, 3.04, 3.08, 4.01, and 8.04. Similarly, paragraph (a)(1) of this Rule requires a lawyer to withdraw from employment when the lawyer knows that the employment will result in a violation of a rule of professional conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may have made such a suggestion in the ill-founded hope that a lawyer will not be constrained by a professional obligation. Cf. Rule 1.02(c) and (d).

3. When a lawyer has been appointed to represent a client and in certain other instances in litigation, withdrawal ordinarily requires approval of the appointing authority or presiding judge. See also Rule 6.01. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The tribunal may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. See also Rule 1.06(e).

Discharge

4. A client has the power to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services, and paragraph (a) of this Rule requires that the discharged lawyer withdraw. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

5. Whether a client can discharge an appointed counsel depends on the applicable law. A client seeking to do so should be given full explanation of the consequences. In some instances the consequences may include a decision by the appointing authority or presiding judge that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

Client with Diminished Capacity

6. If a client lacks the legal capacity to discharge the lawyer, the lawyer may in some situations initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.16.

Optional Withdrawal

7. Paragraph (b) supplements paragraph (a) by permitting a lawyer to withdraw from representation in some certain additional circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. A lawyer is not required to discontinue the representation until the lawyer knows the conduct will be illegal or in violation of these rules, at which point the lawyer's withdrawal is mandated by paragraph (a)(1). Withdrawal is also permitted if the lawyer's services were misused in the past. The lawyer also may withdraw where the client insists on pursuing a repugnant or imprudent objective or one with which the lawyer has fundamental disagreement. A lawyer may withdraw if the client refuses, after being duly warned, to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

8. Withdrawal permitted by paragraph (b)(2) through (7) is optional with the lawyer even though the withdrawal may have a material adverse effect upon the interests of the client.

Assisting the Client Upon Withdrawal

9. In every instance of withdrawal and even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. See paragraph (d). The lawyer may retain papers as security for a fee only to the extent permitted by law.

10. Other rules, in addition to Rule 1.15, require or suggest withdrawal in certain situations. See Rules 1.01, 1.05 Comment 22, 1.06(e) and 1.07(c), 1.11(c), 1.12(d), and 3.08(a).

Rule 1.16. Clients with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for another reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action. Such action may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client

and, in appropriate cases, seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client.

(c) When taking protective action pursuant to (b), the lawyer may disclose the client's confidential information to the extent the lawyer reasonably believes is necessary to protect the client's interests.

Comment:

1. The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. However, maintaining the ordinary client-lawyer relationship may not be possible when the client suffers from a mental impairment, is a minor, or for some other reason has a diminished capacity to make adequately considered decisions regarding representation. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often can understand, deliberate on, and reach conclusions about matters affecting the client's own well-being. For example, some people of advanced age are capable of handling routine financial matters but need special legal protection concerning major transactions. Also, some children are regarded as having opinions entitled to weight in legal proceedings concerning their custody.

2. In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as the client's ability to articulate reasoning leading to a decision, variability of state of mind, and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the lawyer's knowledge of the client's long-term commitments and values.

3. The fact that a client suffers from diminished capacity does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the client has a guardian or other legal representative, the lawyer should, as far as possible, accord the client the normal status of a client, particularly in maintaining communication. If a guardian or other legal representative has been appointed for the client, however, the law may require the client's lawyer to look to the representative for decisions on the client's behalf. If the lawyer represents the guardian as distinct from the ward and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct.

4. The client may wish to have family members or other persons, including a previously designated trusted person, participate in discussions with the lawyer; however, paragraph (a) requires the lawyer to keep the client's interests foremost and, except when taking protective action authorized by paragraph (b), to look to the client, not the family members or other persons, to make decisions on the client's behalf. As part of the client in-take process, lawyers may wish to give new clients the opportunity to designate trusted persons who may be contacted by a lawyer if special needs arise. Any such procedure should provide sufficient information for the client to understand and confer with the lawyer about the designation of a trusted person. Standardized forms may be available from bar associations and practice groups. Information about trusted person designations should be appropriately safeguarded and

periodically updated, as necessary. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.

Taking Protective Action

5. Paragraph (b) contains a non-exhaustive list of actions a lawyer may take in certain circumstances to protect an existing client who does not have a guardian or other legal representative. Such actions could include consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as existing durable powers of attorney, or consulting with support groups, professional services, adult-protective agencies, or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the client's wishes and values to the extent known, the client's best interests, and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities, and respecting the client's family and social connections. If it appears to be necessary to disclose confidential information to a third person to protect the client's best interests, a lawyer should consider whether it would be prudent to ask for the client's consent to the disclosure. Only in compelling cases should the lawyer disclose confidential client information if the client has expressly refused to consent. The authority of a lawyer to disclose confidential client information to protect the interests of the client is limited and extends no further than is reasonably necessary to facilitate protective action.

Duties Under Other Law

6. Nothing in this Rule modifies or reduces a lawyer's obligations under other law.

7. A client with diminished capacity also may cause or threaten physical, financial, or other harm to third parties. In such situations, the client's lawyer should consult applicable law to determine the appropriate response.

8. When a legal representative has not been appointed, the lawyer should consider whether an appointment is reasonably necessary to protect the client's interests. Thus, for example, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, applicable law provides for the appointment of legal representatives in certain circumstances. For example, the Texas Family Code prescribes when a guardian ad litem, attorney ad litem, or amicus attorney should be appointed in a suit affecting the parent-child relationship, and the Texas Estates Code prescribes when a guardian should be appointed for an incapacitated person. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the lawyer's professional judgment. In considering alternatives, the lawyer should be aware of any law that requires the lawyer to advocate on the client's behalf for the action that imposes the least restriction.

Disclosure of the Client's Condition

9. Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. As with any client-lawyer relationship, information relating to the representation of a client is confidential under Rule 1.05. However, when the lawyer is taking protective action, paragraph (b) of this Rule permits the lawyer to make necessary disclosures. Given the risks to the client of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or in seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted will act adversely to the client's interests before discussing matters related to the client. A disclosure of confidential information may be inadvisable if the third person's involvement in the matter is likely to turn confrontational.

Emergency Legal Assistance

10. In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

11. A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

II. COUNSELOR

Rule 2.01. Advisor

In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

Comment:

Scope of Advice

1. A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

2. Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as costs or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

3. A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

4. Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

5. In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Intermediary

6. In regard to a lawyer serving as intermediary for clients with conflicting interests, see Rule 1.07.

Rule 2.02. Evaluation for Use by Third Persons

A lawyer shall not undertake an evaluation of a matter affecting a client for the use of someone other than the client unless:

(a) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(b) the client consents after consultation.

Comment:

Definition

1. An evaluation may be performed at the client's direction but for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

2. Lawyers for the government may be called upon to serve as advisors or as evaluators. A lawyer for the government serves as advisor when the lawyer is an advocate for a government agency or is a counselor for a government agency. When serving as an advisor the rule of confidentiality of information applies. See Rules 1.05 and 2.01.

3. A lawyer for the government serves as evaluator when the lawyer's official responsibility is to render opinions establishing the limits on authorized government activity. In that situation this Rule applies.

4. In addition to serving as advisors or as evaluators, lawyers may be called upon to serve as investigators. When serving as investigator, the identity of the client is critical, because only the client has a confidential relationship with the lawyer. See Rule 1.05. Thus, a lawyer who makes an investigative contact with a non-client in circumstances which might cause the non-client to believe that the lawyer is representing him in the matter should make that non-client aware that rules concerning client loyalty and confidentiality are not applicable. See Rule 1.05. See also Rule 1.12(e).

Third Persons

5. When the evaluation is intended for the information or use of a third person, the evaluation involves a departure from the normal client-lawyer relationship. The lawyer must be satisfied as a matter of

professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

6. The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. See Rule 1.02. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations which are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refused to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances.

Financial Auditors' Requests for Information

7. When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, any response by the lawyer should be made in accordance with procedures recognized in the legal profession.

III. ADVOCATE

Rule 3.01. Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.

Comment:

1. The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, affects the limits within which an advocate may proceed. Likewise, these Rules impose limitations on the types of actions that a lawyer may take on behalf of his client. See Rules 3.02-3.06, 4.01-4.04, and 8.04. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

2. All judicial systems prohibit, at a minimum, the filing of frivolous or knowingly false pleadings, motions or other papers with the court or the assertion in an adjudicatory proceeding of a knowingly false claim

or defense. A filing or assertion is frivolous if it is made primarily for the purpose of harassing or maliciously injuring a person. It also is frivolous if the lawyer is unable either to make a good faith argument that the action taken is consistent with existing law or that it may be supported by a good faith argument for an extension, modification or reversal of existing law.

3. A filing or contention is frivolous if it contains knowingly false statements of fact. It is not frivolous, however, merely because the facts have not been first substantiated fully or because the lawyer expects to develop vital evidence only by discovery. Neither is it frivolous even though the lawyer believes that the client's position ultimately may not prevail. In addition, this Rule does not prohibit the use of a general denial or other pleading to the extent authorized by applicable rules of practice or procedure. Likewise, a lawyer for a defendant in any criminal proceeding or for the respondent in a proceeding that could result in commitment may so defend the proceeding as to require that every element of the case be established.

4. A lawyer should conform not only to this Rule's prohibition of frivolous filings or assertions but also to any more stringent applicable rule of practice or procedure. For example, the duties imposed on a lawyer by Rule 11 of the Federal Rules of Civil Procedure exceed those set out in this Rule. A lawyer must prepare all filings subject to Rule 11 in accordance with its requirements. See Rule 3.04(c)(1).

Rule 3.02. Minimizing the Burdens and Delays of Litigation

In the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter.

Comment:

1. This Rule addresses those situations where a lawyer or the lawyer's client perceive the client's interests as served by conduct that delays resolution of the matter or that increases the costs or other burdens of a case. Because such tactics are frequently an appropriate way of achieving the legitimate interests of the client that are at stake in the litigation, only those instances that are "unreasonable" are prohibited. As to situations where such tactics are inconsistent with the client's interests, see Rule 1.01. As to those where the lawyer's conduct is motivated primarily by his desire to receive a larger fee, see Rule 1.04 and Comment, paragraph 6 thereto.

2. A lawyer's obligations under this Rule are substantially fulfilled by complying with Rules 3.01, 3.03, and 3.04 as supplemented by applicable rules of practice or procedure. See paragraph 4 to the Comment to Rule 3.01.

Unreasonable Delay

3. Dilatory practices indulged in merely for the convenience of lawyers bring the administration of justice into disrepute and normally will be "unreasonable" within the meaning of this Rule. See also Rule 1.01(b) and (c) and paragraphs 6 and 7 of the Comment thereto. This Rule, however, does not require a lawyer

to eliminate all conflicts between the demands placed on the lawyer's time by different clients and proceedings. Consequently, it is not professional misconduct either to seek (or as a matter of professional courtesy, to grant) reasonable delays in some matters in order to permit the competent discharge of a lawyer's multiple obligations.

4. Frequently, a lawyer seeks a delay in some aspect of a proceeding in order to serve the legitimate interests of the client rather than merely the lawyer's own interests. Seeking such delays is justifiable. For example, in order to represent the legitimate interests of the client effectively, a diligent lawyer representing a party named as a defendant in a complex civil or criminal action may need more time to prepare a proper response than allowed by applicable rules of practice or procedure. Similar considerations may pertain in preparing responses to extensive discovery requests. Seeking reasonable delays in such circumstances is both the right and the duty of a lawyer.

5. On the other hand, a client may seek to have a lawyer delay a proceeding primarily for the purpose of harassing or maliciously injuring another. Under this Rule, a lawyer is obliged not to take such an action. See also Rule 3.01. It is not a justification that similar conduct is often tolerated by the bench and the bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay undertaken for the purpose of harassing or malicious injuring. The fact that a client realizes a financial or other benefit from such otherwise unreasonable delay does not make that delay reasonable.

Unreasonable Costs and Other Burdens of Litigation

6. Like delay, increases in the costs or other burdens of litigation may be viewed as serving a wide range of interests of the client. Many of these interests are entirely legitimate and merit the most stringent protection. Litigation by its very nature often is costly and burdensome. This Rule does not subject a lawyer to discipline for taking any actions not otherwise prohibited by these Rules in order to fully and effectively protect the legitimate interests of a client that are at stake in litigation.

7. Not all conduct that increases the costs or other burdens of litigation, however, can be justified in this manner. One example of such impermissible conduct is a lawyer who counsels or assists a client in seeking a multiplication of the costs or other burdens of litigation as the primary purpose, because the client perceives himself as more readily able to bear those burdens than is the opponent, and so hopes to gain an advantage in resolving the matter unrelated to the merits of the client's position.

Rule 3.03. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;

(3) in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;

(4) fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(5) offer or use evidence that the lawyer knows to be false.

(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.

(c) The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.

Comment:

1. The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal.

Factual Representations by a Lawyer

2. An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.01. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or a representation of fact in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.02(c) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. See the Comments to Rules 1.02(c) and 8.04(a).

Misleading Legal Argument

3. Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but should recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(4), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Ex Parte Proceedings

4. Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of unprivileged material facts known to the lawyer if the lawyer reasonably believes the tribunal will not reach a just decision unless informed of those facts.

Anticipated False Evidence

5. On occasion a lawyer may be asked to place into evidence testimony or other material that the lawyer knows to be false. Initially in such situations, a lawyer should urge the client or other person involved to not offer false or fabricated evidence. However, whether such evidence is provided by the client or by another person, the lawyer must refuse to offer it, regardless of the client's wishes. As to a lawyer's right to refuse to offer testimony or other evidence that the lawyer believes is false, see paragraph 15 of this Comment.

6. If the request to place false testimony or other material into evidence came from the lawyer's client, the lawyer also would be justified in seeking to withdraw from the case. See Rules 1.15(a)(1) and (b)(2), (4). If withdrawal is allowed by the tribunal, the lawyer may be authorized under Rule 1.05(c)(7) to reveal the reasons for that withdrawal to any other lawyer subsequently retained by the client in the matter; but normally that rule would not allow the lawyer to reveal that information to another person or to the tribunal. If the lawyer either chooses not to withdraw or is not allowed to do so by the tribunal, the lawyer should again urge the client not to offer false testimony or other evidence and advise the client of the steps the lawyer will take if such false evidence is offered. Even though the lawyer does not receive satisfactory assurances that the client or other witness will testify truthfully as to a particular matter, the lawyer may use that person as a witness as to other matters that the lawyer believes will not result in perjured testimony.

Past False Evidence

7. It is possible, however, that a lawyer will place testimony or other material into evidence and only later learn of its falsity. When such testimony or other evidence is offered by the client, problems arise between the lawyer's duty to keep the client's revelations confidential and the lawyer's duty of candor to the tribunal. Under this Rule, upon ascertaining that material testimony or other evidence is false, the lawyer must first seek to persuade the client to correct the false testimony or to withdraw the false evidence. If the persuasion is ineffective, the lawyer must take additional remedial measures.

8. When a lawyer learns that the lawyer's services have been improperly utilized in a civil case to place false testimony or other material into evidence, the rule generally recognized is that the lawyer must disclose the existence of the deception to the court or to the other party, if necessary rectify the deception. See paragraph (b) and Rule 1.05(h). See also Rule 1.05(g). Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal by the lawyer but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer would be aiding in the deception of the tribunal or jury, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.02(c). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a Criminal Defendant

9. Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that in such cases, as in others, the lawyer should seek to persuade the client to refrain from suborning or offering perjurious testimony or other false evidence, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

10. The proper resolution of the lawyer's dilemma in criminal cases is complicated by two considerations. The first is the substantial penalties that a criminal accused will face upon conviction, and the lawyer's resulting reluctance to impair any defenses the accused wishes to offer on his own behalf having any possible basis in fact. The second is the right of a defendant to take the stand should he so desire, even over the objections of the lawyer. Consequently, in any criminal case where the accused either insists on testifying when the lawyer knows that the testimony is perjurious or else surprises the lawyer with such testimony at trial, the lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

11. Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This solution, however, makes the advocate a knowing instrument of perjury.

12. The other resolution of the dilemma, and the one this Rule adopts, is that the lawyer must take reasonable remedial measure which may include revealing the client's perjury. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with

counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence.

False Evidence Not Introduced by the Lawyer

13. A lawyer may have introduced the testimony of a client or other witness who testified truthfully under direct examination but who offered false testimony or other evidence during examination by another party. Although the lawyer should urge that the false evidence be corrected or withdrawn, the full range of obligation imposed by paragraphs (a)(5) and (b) of this Rule do not apply to such situations. A subsequent use of that false testimony or other evidence by the lawyer in support of the client's case, however, would violate paragraph (a)(5).

Duration of Obligation

14. The time limit on the obligation to rectify the presentation of false testimony or other evidence varies from case to case but continues as long as there is a reasonable possibility of taking corrective legal actions before a tribunal.

Refusing to Offer Proof Believed to be False

15. A lawyer may refuse to offer evidence that the lawyer reasonably believes is untrustworthy, even if the lawyer does not know that the evidence is false. That discretion should be exercised cautiously, however, in order not to impair the legitimate interests of the client. Where a client wishes to have such suspect evidence introduced, generally the lawyer should do so and allow the finder of fact to assess its probative value. A lawyer's obligations under paragraphs (a)(2), (a)(5) and (b) of this Rule are not triggered by the introduction of testimony or other evidence that is believed by the lawyer to be false, but not known to be so.

Rule 3.04. Fairness in Adjudicatory Proceedings

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act.

(b) falsify evidence, counsel or assist a witness to testify falsely, or pay, offer to pay, or acquiesce in the offer or payment of compensation to a witness or other entity contingent upon the content of the testimony of the witness or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for his loss of time in attending or testifying; or

(3) a reasonable fee for the professional services of an expert witness.

(c) except as stated in paragraph (d), in representing a client before a tribunal:

(1) habitually violate an established rule of procedure or of evidence;

(2) state or allude to any matter that the lawyer does not reasonably believe is relevant to such proceeding or that will not be supported by admissible evidence, or assert personal knowledge of facts in issue except when testifying as a witness;

(3) state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused, except that a lawyer may argue on his analysis of the evidence and other permissible considerations for any position or conclusion with respect to the matters stated herein;

(4) ask any question intended to degrade a witness or other person except where the lawyer reasonably believes that the question will lead to relevant and admissible evidence; or

(5) engage in conduct intended to disrupt the proceedings.

(d) knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal except for an open refusal based either on an assertion that no valid obligation exists or on the client's willingness to accept any sanctions arising from such disobedience.

(e) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment:

1. The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedures, and the like.

2. Documents and other evidence are often essential to establish a claim or defense. The right of a party,

including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions, including Texas, makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. See Texas Penal Code, §§ 37.09(a)(1), 37.10(a)(3). See also 18 U.S.C. §§ 1501-1515. Falsifying evidence is also generally a criminal offense. *Id.* §§ 37.09(a)(2), 37.10(a)(1), (2). Paragraph (a) of this Rule applies to evidentiary material generally, including computerized information.

3. Paragraph (c)(1) subjects a lawyer to discipline only for habitual abuses of procedural or evidentiary rules, including those relating to the discovery process. That position was adopted in order to employ the superior ability of the presiding tribunal to assess the merits of such disputes and to avoid inappropriate resort to disciplinary proceedings as a means of furthering tactical litigation objectives. A lawyer in good conscience should not engage in even a single intentional violation of those rules, however, and a lawyer may be subject to judicial sanctions for doing so.

4. Paragraph (c) restates the traditional Texas position regarding the proper role of argument and comment in litigation. The obligations imposed by that paragraph to avoid seeking to influence the outcome of a matter by introducing irrelevant or improper considerations into the deliberative process are important aspects of a lawyer's duty to maintain the fairness and impartiality of adjudicatory proceedings.

5. By the same token, the advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or disruptive conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a tribunal but should avoid reciprocation.

6. Paragraph (d) prohibits the practice of a lawyer not disclosing a client's actual or intended noncompliance with a standing rule or particular ruling of an adjudicatory body or official to other concerned entities. It provides instead that a lawyer must openly acknowledge the client's noncompliance.

7. Paragraph (d) also prohibits a lawyer from disobeying, or advising a client to disobey, any such obligations unless either of two circumstances exists. The first is the lawyer's open refusal based on an assertion that no valid obligation exists. In order to assure due regard for formal rulings and standing rules of practice or procedure, the lawyer's assertion in this regard should be based on a reasonable belief. The second circumstance is that a lawyer may acquiesce in a client's position that the sanctions arising from noncompliance are preferable to the costs of compliance. This situation can arise in criminal cases, for example, where the court orders disclosure of the identity of an informant to the defendant and the government decides that it would prefer to allow the case to be dismissed rather than to make that disclosure. A lawyer should consult with a client about the likely consequences of any such act of disobedience should the client appear to be inclined to pursue that course; but the final decision in that regard rests with the client.

Rule 3.05. Maintaining Impartiality of Tribunal

A lawyer shall not:

(a) seek to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules of practice or procedure;

(b) except as otherwise permitted by law and not prohibited by applicable rules of practice or procedure, communicate or cause another to communicate ex parte with a tribunal for the purpose of influencing that entity or person concerning a pending matter other than:

(1) in the course of official proceedings in the cause;

(2) in writing if he promptly delivers a copy of the writing to opposing counsel or the adverse party if he is not represented by a lawyer;

(3) orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(c) For purposes of this rule:

(1) "Matter" has the meanings ascribed by it in Rule 1.10(f) of these Rules;

(2) A matter is "pending" before a particular tribunal either when that entity has been selected to determine the matter or when it is reasonably foreseeable that that entity will be so selected.

Comment:

Undue Influence

1. Many forms of improper influence upon tribunals are proscribed by criminal law or by applicable rules of practice or procedure. Others are specified in the Texas Code of Judicial Conduct. A lawyer is required to be familiar with, and to avoid contributing to a violation of, all such provisions. See also Rule 3.06.

2. In recent years, however, there has been an increase in alternative methods of dispute resolution, such as arbitration, for which the standards governing a lawyer's conduct are not as well developed. In such situations, as in more traditional settings, a lawyer should avoid any conduct that is or could reasonably be construed as being intended to corrupt or to unfairly influence the decision-maker.

Ex Parte Contacts

3. Historically, ex parte contacts between a lawyer and a tribunal have been subjected to stringent control because of the potential for abuse such contacts present. For example, Canon 3A(4) of the Texas Code

of Judicial Conduct prohibits many ex parte contacts with judicial officials. A lawyer in turn violates Rule 8.04(a)(6) by communicating with such an official in a manner that causes that official to violate Canon 3A(4). This rule maintains that traditional posture towards ex parte communications and extends it to the new settings discussed in paragraph 2 of this Comment.

4. There are certain types of adjudicatory proceedings, however, which have permitted pending issues to be discussed ex parte with a tribunal. Certain classes of zoning questions, for example, are frequently handled in that way. As long as such contacts are not prohibited by law or applicable rules of practice and procedure, and as long as paragraph (a) of this Rule is adhered to, such ex parte contacts will not serve as a basis for discipline.

5. For limitations on the circumstances and the manner in which lawyers may communicate or cause another to communicate with veniremen or jurors, see Rule 3.06.

Rule 3.06. Maintaining Integrity of Jury System

(a) A lawyer shall not:

(1) conduct or cause another, by financial support or otherwise, to conduct a vexatious or harassing investigation of a venireman or juror; or

(2) seek to influence a venireman or juror concerning the merits of a pending matter by means prohibited by law or applicable rules of practice or procedure.

(b) Prior to discharge of the jury from further consideration of a matter, a lawyer connected therewith shall not communicate with or cause another to communicate with anyone he knows to be a member of the venire from which the jury will be selected or any juror or alternate juror, except in the course of official proceedings.

(c) During the trial of a case, a lawyer not connected therewith shall not communicate with or cause another to communicate with a juror or alternate juror concerning the matter.

(d) After discharge of the jury from further consideration of a matter with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

(e) All restrictions imposed by this Rule upon a lawyer also apply to communications with or investigations of members of a family of a venireman or a juror.

(f) A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his family, of which the lawyer has knowledge.

(g) As used in this Rule, the terms "matter" and "pending" have the meanings specified in Rule 3.05(c).

Comment:

1. To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with veniremen prior to trial or with jurors during trial or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with or cause another to communicate with a venireman or a juror about the case. After the trial, communication by a lawyer with jurors is not prohibited by this Rule so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Contacts with discharged jurors, however, are governed by procedural rules the violation of which could subject a lawyer to discipline under Rule 3.04. When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to the personal feelings of the juror.

2. Vexatious or harassing investigations of jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on his behalf who conducts an investigation of veniremen or jurors should act with circumspection and restraint.

3. Communications with or investigations of members of families of veniremen or jurors by a lawyer or by anyone on his behalf are subject to the restrictions imposed upon the lawyer with respect to his communications with or investigations of veniremen and jurors.

4. Because of the extremely serious nature of any actions that threaten the integrity of the jury system, a lawyer who learns of improper conduct by or towards a venireman, a juror, or a member of the family of either should make a prompt report to the court regarding such conduct. If such improper actions were taken by or on behalf of a lawyer, either the reporting lawyer or the court normally should initiate appropriate disciplinary proceedings. See Rules 1.05, 8.03, 8.04.

Rule 3.07. Trial Publicity

(a) In the course of representing a client, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding. A lawyer shall not counsel or assist another person to make such a statement.

(b) A lawyer ordinarily will violate paragraph (a), and the likelihood of a violation increases if the adjudication is ongoing or imminent, by making an extrajudicial statement of the type referred to in that paragraph when the statement refers to:

> (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness; or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense; the existence or contents of any confession, admission, or statement given by a defendant or suspect; or that person's refusal or failure to make a statement;

(3) the performance, refusal to perform, or results of any examination or test; the refusal or failure of a person to allow or submit to an examination or test; or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; or

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

(c) A lawyer ordinarily will not violate paragraph (a) by making an extrajudicial statement of the type referred to in that paragraph when the lawyer merely states:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense, claim or defense involved;

(4) except when prohibited by law, the identity of the persons involved in the matter;

(5) the scheduling or result of any step in litigation;

(6) a request for assistance in obtaining evidence, and information necessary thereto;

(7) a warning of danger concerning the behavior of a person involved, when there is a reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(8) if a criminal case:

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

Comment:

1. Paragraph (a) is premised on the idea that preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial. This is particularly so where trial by jury or lay judge is involved. If there were no such limits, the results would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. Thus, paragraph (a) provides that in the course of representing a client, a lawyer's right to free speech is subordinate to the constitutional requirements of a fair trial. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

2. Because no body of rules can simultaneously satisfy all interests of fair trial and all those of free expression, some balancing of those interests is required. It is difficult to strike that balance. The formula embodied in this Rule, prohibiting those extrajudicial statements that the lawyer knows or reasonably should know have a reasonable likelihood of materially prejudicing an adjudicatory proceeding, is intended to incorporate the degree of concern for the first amendment rights of lawyers, listeners, and the media necessary to pass constitutional muster. The obligations imposed upon a lawyer by this Rule are subordinate to those rights. If a particular statement would be inappropriate for a lawyer to make, however, the lawyer is as readily subject to discipline for counseling or assisting another person to make it as he or she would be for doing so directly. See paragraph (a).

3. The existence of "material prejudice" normally depends on the circumstances in which a particular statement is made. For example, an otherwise objectionable statement may be excusable if reasonably calculated to counter the unfair prejudicial effect of another public statement. Applicable constitutional principles require that the disciplinary standard in this area retain the flexibility needed to take such unique considerations into account.

4. Although they are not standards of discipline, paragraphs (b) and (c) seek to give some guidance concerning what types of statements are or are not apt to violate paragraph (a). Paragraph (b) sets forth conditions under which statements of the types listed in subparagraphs (b)(1) through (5) would likely violate paragraph (a) in the absence of exceptional extenuating circumstances. Paragraph (c), on the other hand, describes statements that are unlikely to violate paragraph (a) in the absence of exceptional aggravating circumstances. Neither paragraph (b) nor paragraph (c) is an exhaustive listing.

5. Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.04(c)(1) and (d) govern a

lawyer's duty with respect to such Rules. Frequently, a lawyer's obligations to the client under Rule 1.05 also will prevent the disclosure of confidential information.

Rule 3.08. Lawyer as Witness

(a) A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client, unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(3) the testimony relates to the nature and value of legal services rendered in the case;

(4) the lawyer is a party to the action and is appearing pro se; or

(5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure.

(c) Without the client's informed consent, a lawyer may not act as advocate in an adjudicatory proceeding in which another lawyer in the lawyer's firm is prohibited by paragraphs (a) or (b) from serving as advocate. If the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter.

Comment:

1. A lawyer who is considering accepting or continuing employment in a contemplated or pending adjudicatory proceeding in which that lawyer knows or believes that he or she may be a necessary witness is obligated by this Rule to consider the possible consequences of those dual roles for both the lawyer's own client and for opposing parties.

2. One important variable in this context is the anticipated tenor of the lawyer's testimony. If that testimony will be substantially adverse to the client, paragraphs (b) and (c) provide the governing standard. In other situations, paragraphs (a) and (c) control.

3. A lawyer who is considering both representing a client in an adjudicatory proceeding and serving as a witness in that proceeding may possess information pertinent to the representation that would be

substantially adverse to the client were it to be disclosed. A lawyer who believes that he or she will be compelled to furnish testimony concerning such matters should not continue to act as an advocate for his or her client except with the client's informed consent, because of the substantial likelihood that such adverse testimony would damage the lawyer's ability to represent the client effectively.

4. In all other circumstances, the principal concern over allowing a lawyer to serve as both an advocate and witness for a client is the possible confusion that those dual roles could create for the finder of fact. Normally those dual roles are unlikely to create exceptional difficulties when the lawyer's testimony is limited to the areas set out in sub-paragraphs (a)(1)-(4) of this Rule. If, however, the lawyer's testimony concerns a controversial or contested matter, combining the roles of advocate and witness can unfairly prejudice the opposing party. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

5. Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that similar considerations apply if a lawyer's testimony relates solely to a matter of formality and there is no reason to believe that substantial opposing evidence will be offered. In each of those situations requiring the involvement of another lawyer would be a costly procedure that would serve no significant countervailing purpose.

6. Sub-paragraph (a)(3) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony. Sub-paragraph (a)(4) makes it clear that this Rule is not intended to affect a lawyer's right to self representation.

7. Apart from these four exceptions, sub-paragraph (a)(5) recognizes an additional exception based upon a balancing of the interests of the client and those of the opposing party. In implementing this exception, it is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. For example, sub-paragraph (a)(5) requires that a lawyer relying on that sub-paragraph as a basis for serving as both an advocate and a witness for a party give timely notification of that fact to opposing counsel. That requirement serves two purposes. First, it prevents the testifying lawyer from creating a "substantial hardship," where none once existed, by virtue of a lengthy representation of the client in the matter at hand. Second, it puts opposing parties on notice of the situation, thus enabling them to make any desired response at the earliest opportunity.

8. This rule does not prohibit the lawyer who may or will be a witness from participating in the preparation of a matter for presentation to a tribunal. To minimize the possibility of unfair prejudice to an opposing party, however, the Rule prohibits any testifying lawyer who could not serve as an advocate from taking an active role before the tribunal in the presentation of the matter. See paragraph (c). Even in those situations, however, another lawyer in the testifying lawyer's firm may act as an advocate, provided the client's informed consent is obtained.

9. Rule 3.08 sets out a disciplinary standard and is not well suited to use as a standard for procedural disqualification. As a disciplinary rule it serves two principal purposes. The first is to insure that a client's case is not compromised by being represented by a lawyer who could be a more effective witness for the client by not also serving as an advocate. See paragraph (a). The second is to insure that a client is not burdened by counsel who may have to offer testimony that is substantially adverse to the client's cause. See paragraph (b).

10. This Rule may furnish some guidance in those procedural disqualification disputes where the party seeking disqualification can demonstrate actual prejudice to itself resulting from the opposing lawyer's service in the dual roles. However, it should not be used as a tactical weapon to deprive the opposing party of the right to be represented by the lawyer of his or her choice. For example, a lawyer should not seek to disqualify an opposing lawyer under this Rule merely because the opposing lawyer's dual roles may involve an improper conflict of interest with respect to the opposing lawyer's client, for that is a matter to be resolved between lawyer and client or in a subsequent disciplinary proceeding. Likewise, a lawyer should not seek to disqualify an opposing lawyer by unnecessarily calling that lawyer as a witness. Such unintended applications of this Rule, if allowed, would subvert its true purpose by converting it into a mere tactical weapon in litigation.

Rule 3.09. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause;

(b) refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial or post-trial rights;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.07.

Comment:

Source and Scope of Obligations

1. A prosecutor has the responsibility to see that justice is done, and not simply to be an advocate. This responsibility carries with it a number of specific obligations. Among these is to see that no person is threatened with or subjected to the rigors of a criminal prosecution without good cause. See paragraph (a). In addition a prosecutor should not initiate or exploit any violation of a suspect's right to counsel, nor should he initiate or encourage efforts to obtain waivers of important pretrial, trial or post-trial rights from unrepresented persons. See paragraphs (b) and (c). In addition, a prosecutor is obliged to see that the defendant is accorded procedural justice, that the defendant's guilt is decided upon the basis of sufficient evidence, and that any sentence imposed is based on all unprivileged information known to the prosecutor. See paragraph (d). Finally, a prosecutor is obliged by this rule to take reasonable measures to see that persons employed or controlled by him refrain from making extrajudicial statements that are prejudicial to the accused. See paragraph (e) and Rule 3.07. See also Rule 3.03(a)(3), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.04.

2. Paragraph (a) does not apply to situations where the prosecutor is using a grand jury to determine whether any crime has been committed, nor does it prevent a prosecutor from presenting a matter to a grand jury even though he has some doubt as to what charge, if any, the grand jury may decide is appropriate, as long as he believes that the grand jury could reasonably conclude that some charge is proper. A prosecutor's obligations under that paragraph are satisfied by the return of a true bill by a grand jury, unless the prosecutor believes that material inculpatory information presented to the grand jury was false.

3. Paragraph (b) does not forbid the lawful questioning of any person who has knowingly, intelligently and voluntarily waived the rights to counsel and to silence, nor does it forbid such questioning of any unrepresented person who has not stated that he wishes to retain a lawyer and who is not entitled to appointed counsel. See also Rule 4.03.

4. Paragraph (c) does not apply to any person who has knowingly, intelligently and voluntarily waived the rights referred to therein in open court, nor does it apply to any person appearing pro se with the approval of the tribunal. Finally, that paragraph does not forbid a prosecutor from advising an unrepresented accused who has not stated he wishes to retain a lawyer and who is not entitled to appointed counsel and who has indicated in open court that he wishes to plead guilty to charges against him of his pre-trial, trial and post-trial rights, provided that the advice given is accurate; that it is undertaken with the knowledge and approval of the court; and that such a practice is not otherwise prohibited by law or applicable rules of practice or procedure.

5. The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order

from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

6. Subparagraph (e) does not subject a prosecutor to discipline for failing to take measures to prevent investigators, law enforcement personnel or other persons assisting or associated with the prosecutor, but not in his employ or under his control, from making extrajudicial statements that the prosecutor would be prohibited from making under Rule 3.07. To the extent feasible, however, the prosecutor should make reasonable efforts to discourage such persons from making statements of that kind.

Rule 3.10. Advocate in Nonadjudicative Proceedings

A lawyer representing a client before a legislative or administrative body in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.04(a) through (d), 3.05(a), and 4.01.

Comment:

1. In appearing before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedure. A lawyer is required to disclose whether a particular appearance is in a representative capacity. Although not required to do so by Rule 3.10, a lawyer should reveal the identities of the lawyer's clients, unless privileged or otherwise protected, so that the decision-making body can weigh the lawyer's presentation more accurately. See Rule 4.01, Comment 1.

2. Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers.

3. As to the representation of a client in a negotiation or other bilateral transaction with a governmental agency, see Rules 4.01 through 4.04.

IV. NON-CLIENT RELATIONSHIPS

Rule 4.01. Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the

lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

Comment:

False Statements of Fact

1. Paragraph (a) of this Rule refers to statements of *material* fact. Whether a particular statement should be regarded as one of *material* fact can depend on the circumstances. For example, certain types of statements ordinarily are not taken as statements of material fact because they are viewed as matters of opinion or conjecture. Estimates of price or value placed on the subject of a transaction are in this category. Similarly, under generally accepted conventions in negotiation, a party's supposed intentions as to an acceptable settlement of a claim may be viewed merely as negotiating positions rather than as accurate representation of material fact. Likewise, according to commercial conventions, the fact that a particular transaction is being undertaken on behalf of an undisclosed principal need not be disclosed except where non-disclosure of the principal would constitute fraud.

2. A lawyer violates paragraph (a) of this Rule either by making a false statement of law or material fact or by incorporating or affirming such a statement made by another person. Such statements will violate this Rule, however, only if the lawyer knows they are false and intends thereby to mislead. As to a lawyer's duty to decline or terminate representation in such situations, see Rule 1.15.

Failure to Disclose a Material Fact

3. Paragraph (b) of this Rule also relates only to failures to disclose *material* facts. Generally, in the course of representing a client a lawyer has no duty to inform a third person of relevant or material facts, except as required by law or by applicable rules of practice or procedure, such as formal discovery. However, a lawyer must not allow fidelity to a client to become a vehicle for a criminal act or a fraud being perpetrated by that client. Consequently a lawyer must disclose a material fact to a third party if the lawyer knows that the client is perpetrating a crime or a fraud and the lawyer knows that disclosure is necessary to prevent the lawyer from becoming a party to that crime or fraud. Failure to disclose under such circumstances is misconduct only if the lawyer intends thereby to mislead.

4. When a lawyer discovers that a client has committed a criminal or fraudulent act in the course of which the lawyer's services have been used, or that the client is committing or intends to commit any criminal or fraudulent act, other of these Rules require the lawyer to urge the client to take appropriate action. See Rules 1.02(d), (e), (f); 3.03(b). Since the disclosures called for by paragraph (b) of this Rule will be "necessary" only if the lawyer's attempts to counsel his client not to commit the crime or fraud are unsuccessful, a lawyer is not authorized to make them without having first undertaken those other remedial actions. See also Rule 1.05.

Fraud by a Client

5. A lawyer should never knowingly assist a client in the commission of a criminal act or a fraudulent act.

See Rule 1.02(c).

6. This rule governs a lawyer's conduct during "the course of representing a client." If the lawyer has terminated representation prior to learning of a client's intention to commit a criminal or fraudulent act, paragraph (b) of this Rule does not apply. See "Fraud" under TERMINOLOGY.

Rule 4.02. Communication with One Represented by Counsel

(a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(b) In representing a client a lawyer shall not communicate or cause another to communicate about the subject of representation with a person or organization a lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(c) For the purpose of this rule, "organization or entity of government" includes: (1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or (2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.

(d) When a person, organization, or entity of government that is represented by a lawyer in a matter seeks advice regarding that matter from another lawyer, the second lawyer is not prohibited by paragraph (a) from giving such advice without notifying or seeking consent of the first lawyer.

Comment:

1. Paragraph (a) of this Rule is directed at efforts to circumvent the lawyer-client relationship existing between other persons, organizations or entities of government and their respective counsel. It prohibits communications that in form are between a lawyer's client and another person, organization or entity of government represented by counsel where, because of the lawyer's involvement in devising and controlling their content, such communication in substance are between the lawyer and the represented person, organization or entity of government.

2. Paragraph (a) does not, however, prohibit communication between a lawyer's client and persons, organizations, or entities of government represented by counsel, as long as the lawyer does not cause or encourage the communication without the consent of the lawyer for the other party. Consent may be implied as well as express, as, for example, where the communication occurs in the form of a private placement memorandum or similar document that obviously is intended for multiple recipients and that normally is furnished directly to persons, even if known to be represented by counsel. Similarly, that

paragraph does not impose a duty on a lawyer to affirmatively discourage communication between the lawyer's client and other represented persons, organizations or entities of government. Furthermore, it does not prohibit client communications concerning matters outside the subject of the representation with any such person, organization, or entity of government. Finally, it does not prohibit a lawyer from furnishing a "second opinion" in a matter to one requesting such opinion, nor from discussing employment in the matter if requested to do so. But see Rules 7.01 and 8.04(a)(3).

3. Paragraph (b) of this Rule provides that unless authorized by law, experts employed or retained by a lawyer for a particular matter should not be contacted by opposing counsel regarding that matter without the consent of the lawyer who retained them. However, certain governmental agents or employees such as police may be contacted due to their obligations to the public at large.

4. In the case of an organization or entity of government, this Rule prohibits communications by a lawyer for one party concerning the subject of the representation with persons having a managerial responsibility on behalf of the organization that relates to the subject of the representation and with those persons presently employed by such organization or entity whose act or omission may make the organization or entity vicariously liable for the matter at issue, without the consent of the lawyer for the organization or entity of government involved. This Rule is based on the presumption that such persons are so closely identified with the interests of the organization or entity of government that its lawyers will represent them as well. If, however, such an agent or employee is represented in the matter by his or her own counsel that presumption is inapplicable. In such cases, the consent by that counsel to communicate will be sufficient for purposes of this Rule. Compare Rule 3.04(f). Moreover, this Rule does not prohibit a lawyer from contacting a former employee of a represented organization or entity of a government, nor from contacting a person presently employed by such an organization or entity whose conduct is not a matter at issue but who might possess knowledge concerning the matter at issue.

Rule 4.03. Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Comment:

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel. With regard to the special responsibilities of a prosecutor, see Rule 3.09.

Rule 4.04. Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer shall not present, participate in presenting, or threaten to present:

(1) criminal or disciplinary charges solely to gain an advantage in a civil matter; or

(2) civil, criminal or disciplinary charges against a complainant, a witness, or a potential witness in a bar disciplinary proceeding solely to prevent participation by the complainant, witness or potential witness therein.

Comment:

1. Although in most cases a lawyer's responsibility to the interest of his client is paramount to the interest of other persons, a lawyer should avoid the infliction of needless harm.

2. Using or threatening to use the criminal process solely to coerce a party in a private matter improperly suggests that the criminal process can be manipulated by private interests for personal gain. However, giving any notice required by law or applicable rules of practice or procedure as a prerequisite to instituting criminal charges does not violate this Rule, unless the underlying criminal charges were made without probable cause.

3. Using or threatening to use the civil, criminal, or disciplinary processes to coerce a complainant, a witness, or a potential witness in a bar disciplinary proceeding is an implication that lawyers can manipulate the legal system to their personal advantage. Creating such false impressions is an abuse of the legal system that diminishes public confidence in the legal profession and in the fairness of the legal system as a whole.

V. LAW FIRMS AND ASSOCIATIONS

Rule 5.01. Responsibilities of a Partner or Supervisory Lawyer

A lawyer shall be subject to discipline because of another lawyer's violation of these rules of professional conduct if:

(a) The lawyer is a partner or supervising lawyer and orders, encourages, or knowingly permits the conduct involved; or

(b) The lawyer is a partner in the law firm in which the other lawyer practices, is the general counsel of a government agency's legal department in which the other lawyer is employed, or has direct supervisory

authority over the other lawyer, and with knowledge of the other lawyer's violation of these rules knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer's violation.

Comment:

1. Rule 5.01 conforms to the general principle that a lawyer is not vicariously subjected to discipline for the misconduct of another person. Under Rule 8.04, a lawyer is subject to discipline if the lawyer knowingly assists or induces another to violate these rules. Rule 5.01(a) additionally provides that a partner or supervising lawyer is subject to discipline for ordering or encouraging another lawyer's violation of these rules. Moreover, a partner or supervising lawyer is in a position of authority over the work of other lawyers and the partner or supervising lawyer may be disciplined for permitting another lawyer to violate these rules.

2. Rule 5.01(b) likewise is concerned with the lawyer who is in a position of authority over another lawyer and who knows that the other lawyer has committed a violation of a rule of professional conduct. A partner in a law firm, the general counsel of a government agency's legal department, or a lawyer having direct supervisory authority over specific legal work by another lawyer, occupies the position of authority contemplated by Rule 5.01(b).

3. Whether a lawyer has "direct supervisory authority over the other lawyer" in particular circumstances is a question of fact. In some instances, a senior associate may be a supervising attorney.

4. The duty imposed upon the partner or other authoritative lawyer by Rule 5.01(b) is to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer's known violation. Appropriate remedial action by a partner or other supervisory lawyer would depend on many factors, such as the immediacy of the partner's or supervisory lawyer's knowledge and involvement, the nature of the action that can reasonably be expected to avoid or mitigate injurious consequences, and the seriousness of the anticipated consequences. In some circumstances, it may be sufficient for a junior partner to refer the ethical problem directly to a designated senior partner or a management committee. A lawyer supervising a specific legal matter may be required to intervene more directly. For example if a supervising lawyer knows that a supervised lawyer misrepresented a matter to an opposing party in negotiation, the supervisor as well as the other lawyer may be required by Rule 5.01(b) to correct the resulting misapprehension.

5. Thus, neither Rule 5.01(a) nor Rule 5.01(b) visits vicarious disciplinary liability upon the lawyer in a position of authority. Rather, the lawyer in such authoritative position is exposed to discipline only for his or her own knowing actions or failures to act. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these rules.

6. Wholly aside from the dictates of these rules for discipline, a lawyer in a position of authority in a firm or government agency or over another lawyer should feel a moral compunction to make reasonable efforts to ensure that the office, firm, or agency has in effect appropriate procedural measures giving

reasonable assurance that all lawyers in the office conform to these rules. This moral obligation, although not required by these rules, should fall also upon lawyers who have intermediate managerial responsibilities in the law department of an organization or government agency.

7. The measures that should be undertaken to give such reasonable assurance may depend on the structure of the firm or organization and upon the nature of the legal work performed. In a small firm, informal supervision and an occasional admonition ordinarily will suffice. In a large firm, or in practice situations where intensely difficult ethical problems frequently arise, more elaborate procedures may be called for in order to give such assurance. Obviously, the ethical atmosphere of a firm influences the conduct of all of its lawyers. Lawyers may rely also on continuing legal education in professional ethics to guard against unintentional misconduct by members of their firm or organization.

Rule 5.02. Responsibilities of a Supervised Lawyer

A lawyer is bound by these rules notwithstanding that the lawyer acted under the supervision of another person, except that a supervised lawyer does not violate these rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional conduct.

Comment:

1. Rule 5.02 embodies the fundamental concept that every lawyer is a trained, mature, licensed professional who has sworn to uphold ethical standards and who is responsible for the lawyer's own conduct. Accordingly, a lawyer is not relieved from compliance with these rules because the lawyer acted under the supervision of an employer or other person. In some situations, the fact that a lawyer acted at the direction or order of another person may be relevant in determining whether the lawyer had the knowledge required to render the conduct a violation of these rules. The fact of supervision may also, of course, be a circumstance to be considered by a grievance committee or court in mitigation of the penalty to be imposed for violation of a rule.

2. In many law firms and organizations, the relatively inexperienced lawyer works as an assistant to a more experienced lawyer or is directed, supervised or given guidance by an experienced lawyer in the firm. In the normal course of practice the senior lawyer has the responsibility for making the decisions involving professional judgment as to procedures to be taken, the status of the law, and the propriety of actions to be taken by the lawyers. Otherwise a consistent course of action could not be taken on behalf of clients. The junior lawyer reasonably can be expected to acquiesce in the decisions made by the senior lawyer unless the decision is clearly wrong.

3. Rule 5.02 take a realistic attitude toward those prevailing modes of practice by lawyers not engaged in solo practice. Accordingly, Rule 5.02 provides the supervised lawyer with a special defense in a disciplinary proceeding in which the lawyer is charged with having violated a rule of professional conduct. The supervised lawyer is entitled to this defense only if it appears that an arguable question of professional conduct was resolved by a supervising lawyer and that a resolution made by the supervising lawyer was a reasonable resolution. The resolution is a reasonable one, even if it is ultimately found to

be officially unacceptable, provided it would have appeared reasonable to a disinterested, competent lawyer based on the information reasonably available to the supervising lawyer at the time the resolution was made. "Supervisory lawyer" as used in Rule 5.02 should be construed in conformity with prevailing modes of practice in firms and other groups and, therefore, should include a senior lawyer who undertakes to resolve the question of professional propriety as well as a lawyer who more directly supervises the supervised lawyer.

4. By providing such a defense to the supervised lawyer, Rule. 5.02 recognizes that the inexperienced lawyer working under the direction or supervision of an employer or senior attorney is not in a favorable position to disagree with reasonable decisions made by the experienced lawyer. Often, the only choices available to the supervised lawyer would be to accept the decision made by the senior lawyer or to resign or otherwise lose the employment. This provision of Rule 5.02 also recognizes that it is not necessarily improper for the inexperienced lawyer to rely, reasonably and in good faith, upon decisions made in unclear matters by senior lawyers in the organization.

5. The defense provided by this Rule is available without regard to whether the conduct in question was originally proposed by the supervised lawyer or another person. Nevertheless, the supervised lawyer is not permitted to accept an unreasonable decision as to the propriety of professional conduct. The Rule obviously provides no defense to the supervised lawyer who participates in clearly wrongful conduct. Reliance can be placed only upon a reasonable resolution made by the supervisory lawyer.

6. The protection afforded by Rule 5.02 to a supervised lawyer relates only to professional disciplinary proceedings. Whether a similar defense may exist in actions in tort or for breach of contract is a question beyond the scope of the Texas Rules of Professional Conduct.

Rule 5.03. Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(b) a lawyer shall be subject to discipline for the conduct of such a person that would be a violation of these rules if engaged in by a lawyer if:

(1) the lawyer orders, encourages, or permits the conduct involved; or

(2) the lawyer:

(i) is a partner in the law firm in which the person is employed, retained by, or associated with; or is the general counsel of a government agency's legal department in which the person is employed, retained by or associated with; or has direct supervisory authority over such person; and

(ii) with knowledge of such misconduct by the nonlawyer knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of that person's misconduct.

Comment:

1. Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising non-lawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

2. Each lawyer in a position of authority in a law firm or in a government agency should make reasonable efforts to ensure that the organization has in effect measures giving reasonable assurance that the conduct of nonlawyers employed or retained by or associated with the firm or legal department is compatible with the professional obligations of the lawyer. This ethical obligation includes lawyers having supervisory authority or intermediate managerial responsibilities in the law department of any enterprise or government agency.

Rule 5.04. Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share or promise to share legal fees with a non-lawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate, or a lawful court order, may provide for the payment of money, over a reasonable period of time, to the lawyer's estate to or for the benefit of the lawyer's heirs or personal representatives, beneficiaries, or former spouse, after the lawyer's death or as otherwise provided by law or court order.

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(3) a lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal

services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment:

1. The provisions of Rule 5.04(a) express traditional limitations on sharing legal fees with nonlawyers. The principal reasons for these limitations are to prevent solicitation by lay persons of clients for lawyers and to avoid encouraging or assisting nonlawyers in the practice of law. See Rules 5.04(d), 5.05 and 7.03. The same reasons support Rule 5.04(b).

2. The exceptions stated in Rule 5.04(a) involve situations where the sharing of legal fees with a nonlawyer is not likely to encourage improper solicitation or unauthorized practice of law. For example, it is appropriate for a law firm agreement to provide for the payment of money after the death of a lawyer, or after the establishment of a guardianship for an incapacitated lawyer, to the estate of or to a trust created by the lawyer. A court order, such as a divorce decree, may provide, when appropriate, for the division of legal fees with a nonlawyer. Likewise, the inclusion of a secretary or nonlawyer office administrator in a retirement plan to which the law firm contributes a portion of its profits or legal fees is proper because this division of legal fees is unlikely to encourage improper solicitation or unauthorized practice of law.

3. Rule 5.04(a) forbids only the sharing of legal fees with a nonlawyer and does not necessarily mandate that employees be paid only on the basis of a fixed salary. Thus, the payment of an annual or other bonus does not constitute the sharing of legal fees if the bonus is neither based on a percentage of the law firm's profits or on a percentage of particular legal fees nor is given as a reward for conduct forbidden to lawyers. Similarly, the division between lawyer and client of the proceeds of a settlement judgment or other award in which both damages and attorney fees have been included does not constitute an improper sharing of legal fees with a nonlawyer. Reimbursement by a lawyer made to a bona fide or pro bono legal services entity for its reasonable expenses in connection with the matter referred to or being handled by the lawyer does not constitute a division of legal fees within the meaning of Rule 5.04.

4. Because the lawyer-client relationship is a personal relationship in which the client generally must trust the lawyer to exercise appropriate professional judgment on the client's behalf, Rule 5.04(c) provides that a lawyer shall not permit improper interference with the exercise of the lawyer's professional judgment solely on behalf of the client. The lawyer's professional judgment should be exercised only for the benefit

of the client, free of compromising influences and loyalties. Therefore, under Rule 5.04(c) a person who recommends, employs, or pays the lawyer to render legal services for another cannot be permitted to interfere with the lawyer's professional relationship with that client. Similarly, neither the lawyer's personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client.

5. Because a lawyer must always be free to exercise professional judgment without regard to the interests or motives of a third person, the lawyer who is employed or paid by one to represent another should guard constantly against erosion of the lawyer's professional judgment. The lawyer should recognize that a person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of the lawyer. The lawyer should be watchful that such persons or organizations are not seeking to further their own economic, political, or social goals without regard to the lawyer's responsibility to the client. Moreover, a lawyer employed by an organization is required by Rule 5.04(c) to decline to accept direction of the lawyer's professional judgment from any nonlawyer in the organization.

6. Rule 5.04(d) forbids a lawyer to practice with or in the form of a professional corporation or association in certain specific situations where erosion of the lawyer's professional independence may be threatened. The danger of erosion of the lawyer's professional independence sometimes may exist when a lawyer practices with associations or organizations not covered by Rule 5.04(d). For example, various types of legal aid offices are administered by boards of directors composed of lawyers and nonlawyers, and a lawyer should not accept or continue employment with such an organization unless the board sets only broad policies and does not interfere in the relationship of the lawyer and the individual client that the lawyer serves. See Rule 1.13. Whenever a lawyer is employed by an organization, a written agreement that defines the relationship between the lawyer and the organization and that provides for the lawyer's professional independence is desirable since it may serve to prevent misunderstanding as to their respective roles.

Rule 5.05. Unauthorized Practice of Law

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Comment:

1. Courts generally have prohibited the unauthorized practice of law because of a perceived need to protect individuals and the public from the mistakes of the untrained and the schemes of the unscrupulous, who are not subject to the judicially imposed disciplinary standards of competence,

responsibility and accountability.

2. Neither statutory nor judicial definitions offer clear guidelines as to what constitutes the practice of law or the unauthorized practice of law. All too frequently, the definitions are so broad as to be meaningless and amount to little more than the statement that "the practice of law" is merely whatever lawyers do or are traditionally understood to do. The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.

3. Rule 5.05 does not attempt to define what constitutes the "unauthorized practice of law" but leaves the definition to judicial development. Judicial development of the concept of "law practice" should emphasize that the concept is broad enough--but only broad enough--to cover all situations where there is rendition of services for others that call for the professional judgment of a lawyer and where the one receiving the services generally will be unable to judge whether adequate services are being rendered and is, therefore, in need of the protection afforded by the regulation of the legal profession.

Competent professional judgment is the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment; and the essence of the professional judgment of the lawyer is the lawyer's educated ability to relate the general body and philosophy of law to a specific legal problem of a client.

4. Paragraph (b) of Rule 5.05 does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them. So long as the lawyer supervises the delegated work, and retains responsibility for the work, and maintains a direct relationship with the client, the paraprofessional cannot reasonably be said to have engaged in activity that constitutes the unauthorized practice of law. See Rule 5.03. Likewise, paragraph (b) does not prohibit lawyers from providing professional advice and instructions to nonlawyers whose employment requires knowledge of law. For example, claims adjusters, employees of financial institutions, social workers, abstracters, police officers, accountants, and persons employed in government agencies are engaged in occupations requiring knowledge of law; and a lawyer who assists them to carry out their proper functions is not assisting the unauthorized practice of law. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se, since a nonlawyer who represents himself or herself is not engaged in the unauthorized practice of law.

5. Authority to engage in the practice of law conferred in any jurisdiction is not necessarily a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where doing so violates the regulation of the practice of law in that jurisdiction. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by individual states. In furtherance of the public interest, lawyers should discourage regulations that unreasonably impose territorial limitations upon the right of a lawyer to handle the legal affairs of a client or upon the opportunity of a client to obtain the services of a lawyer of his or her choice.

Rule 5.06. Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a suit or controversy, except that as part of the settlement of a disciplinary proceedings against a lawyer an agreement may be made placing restrictions on the right of that lawyer to practice.

Comment:

1. An agreement restricting the rights of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

2. Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

Rule 5.07. [Blank]

Rule 5.08. Prohibited Discriminatory Activities

(a) A lawyer shall not willfully, in connection with an adjudicatory proceeding, except as provided in paragraph (b), manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity.

(b) Paragraph (a) does not apply to a lawyer's decision whether to represent a particular person in connection with an adjudicatory proceeding, nor to the process of jury selection, nor to communications protected as "confidential information" under these Rules. See Rule 1.05(a), (b). It also does not preclude advocacy in connection with an adjudicatory proceeding involving any of the factors set out in paragraph (a) if that advocacy:

> (i) is necessary in order to address any substantive or procedural issues raised by the proceeding; and
>
> (ii) is conducted in conformity with applicable rulings and orders of a tribunal and applicable rules of practice and procedure.

Comment:

1. Subject to certain exemptions, paragraph (a) of this Rule prohibits willful expressions of bias or prejudice in connection with adjudicatory proceedings that are directed towards any persons involved with those proceedings in any capacity. Because the prohibited conduct only must occur "in connection with" an adjudicatory proceeding, it applies to misconduct transpiring outside of as well as in the presence of the tribunal's presiding adjudicatory official. Moreover, the broad definition given to the term "adjudicatory proceeding" under these Rules means that paragraph (a)'s prohibition applies to many settings besides conventional litigation in federal or state courts. See Preamble: Terminology (definitions of "Adjudicatory Proceeding" and "Tribunal").

2. The Rule, however, contains several important limitations and exemptions. The first, found in paragraph (a), is that a lawyer's allegedly improper words or conduct must be shown to have been "willful" before the lawyer may be subjected to discipline.

3. In addition, paragraph (b) sets out four exemptions from the prohibition of paragraph (a). The first is a lawyer's decision whether to represent a client. The second is any communication made by the lawyer that is "confidential" under Rule 1.05(a) and (b). The third is a lawyer's communication that is necessary to represent a client properly and that complies with applicable rulings and orders of the tribunal as well as with applicable rules of practice or procedure.

4. The fourth exemption in paragraph (b) relates to the lawyer's words or conduct in selecting a jury. This exemption ensures that a lawyer will be free to thoroughly probe the venire in an effort to identify potential jurors having a bias or prejudice towards the lawyer's client, or in favor of the client's opponent, based on, among other things, the factors enumerated in paragraph (a). A lawyer, should remember, however, that the use of peremptory challenges to remove persons from juries based solely on some of the factors listed in paragraph (a) raises separate constitutional issues.

VI. PUBLIC SERVICE

Rule 6.01. Accepting Appointments by a Tribunal

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of law or rules of professional conduct;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Comment:

Appointment

1. A lawyer may be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services. For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.01, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. Compare Rules 1.06(b), 1.15(a)(2), 1.15(b)(4). A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust. Compare Rule 1.15(b)(6). However, a lawyer should not seek to decline an appointment because of such factors as a distaste for the subject matter or the proceeding, the identity or position of a person involved in the case, the lawyer's belief that a defendant in a criminal proceeding is guilty, or the lawyer's belief regarding the merits of a civil case.

2. An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

Public Interest Service

3. The rights and responsibilities of individuals and organizations in Texas and throughout the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for all persons. Consequently, each lawyer engaged in the practice of law should render public interest legal service. Personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer.

Unpopular Causes

4. A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. Frequently, however, the needs of such a client for a lawyer's services are particularly pressing and, in some cases, the client may have a right to legal representation. At the same time, either financial considerations or the same qualities of the client or the client's cause that make a lawyer reluctant to accept employment may severely limit the client's ability to obtain counsel. As a consequence, the lawyer's freedom to reject clients is morally qualified. Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, a lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

5. An individual lawyer may fulfill the ethical responsibility to provide public interest legal service by accepting a fair share of unpopular matters or indigent or unpopular clients. History is replete with

instances of distinguished and sacrificial services by lawyers who have represented unpopular clients and causes. Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse. Likewise, a lawyer should not reject tendered employment because of the personal preference of a lawyer to avoid adversary alignment against judges, other lawyers, public officials, or influential members of the community.

Rule 6.02 [Blank]

Rule 6.03 [Blank]

Rule 6.04 [Blank]

Rule 6.05. Conflict of Interest Exceptions for Nonprofit and Limited Pro Bono Legal Services

(a) The conflicts of interest limitations on representation in Rules 1.06, 1.07, and 1.09 do not prohibit a lawyer from providing, or offering to provide, limited pro bono legal services unless the lawyer knows, at the time the services are provided, that the lawyer would be prohibited by those limitations from providing the services.

(b) Lawyers in a firm with a lawyer providing, or offering to provide, limited pro bono legal services shall not be prohibited by the imputation provisions of Rules 1.06, 1.07, and 1.09 from representing a client if that lawyer does not:

(1) disclose confidential information of the pro bono client to the lawyers in the firm; or

(2) maintain such information in a manner that would render it accessible to the lawyers in the firm.

(c) The eligibility information that an applicant is required to provide when applying for free legal services or limited pro bono legal services from a program described in subparagraph (d)(1) by itself will not create a conflict of interest if:

(1) the eligibility information is not material to the legal matter; or

(2) the applicant's provision of the eligibility information was conditioned on the applicant's informed consent that providing this information would not by itself prohibit a representation of another client adverse to the applicant.

(d) As used in this Rule, "limited pro bono legal services" means legal services that are:

(1) provided through a pro bono or assisted pro se program sponsored by a court, bar association, accredited law school, or nonprofit legal services program;

(2) short-term services such as legal advice or other brief assistance with pro se documents or transactions, provided either in person or by phone, hotline, internet, or video conferencing; and

(3) provided without any expectation of extended representation of the limited assistance client or of receiving any legal fees in that matter.

(e) As used in this Rule, a lawyer is not "in a firm" with other lawyers solely because the lawyer provides limited pro bono legal services with the other lawyers.

Comment:

1. Nonprofit legal services organizations, courts, law schools, and bar associations have programs through which lawyers provide short-term limited legal services typically to help low-income persons address their legal problems without further representation by the lawyers. In these programs, such as legal-advice hotlines, advice-only clinics, disaster legal services, or programs providing guidance to self-represented litigants, a client-lawyer relationship is established, but there is no expectation that the relationship will continue beyond the limited consultation and there is no expectation that the lawyer will receive any compensation from the client for the services. These programs are normally operated under circumstances in which it is not feasible for a lawyer to check for conflicts of interest as is normally required before undertaking a representation.

2. Application of the conflict of interest rules has deterred lawyers from participating in these programs, preventing persons of limited means from obtaining much needed legal services. To facilitate the provision of free legal services to the public, this Rule creates narrow exceptions to the conflict of interest rules for limited pro bono legal services. These exceptions are justified because the limited and short-term nature of the legal services rendered in such programs reduces the risk that conflicts of interest will arise between clients represented through the program and other clients of the lawyer or the lawyer's firm. Other than the limited exceptions set forth in this Rule, a lawyer remains subject to all applicable conflict of interest rules.

Scope of Representation

3. A lawyer who provides services pursuant to this Rule should secure the client's consent to the limited scope of the representation after explaining to the client what that means in the particular circumstance. See Rule 1.02(b). If a short-term limited representation would not be fully sufficient under the circumstances, the lawyer may offer advice to the client but should also advise the client of the need for further assistance of counsel. See Rule 1.03(b).

Conflicts and the Lawyer Providing Limited Pro Bono Legal Services

4. Paragraph (a) exempts compliance with Rules 1.06, 1.07, and 1.09 for a lawyer providing limited pro bono legal services unless the lawyer actually knows that the representation presents a conflict of interest for the lawyer or for another lawyer in the lawyer's firm. A lawyer providing limited pro bono legal

services is not obligated to perform a conflicts check before undertaking the limited representation. If, after commencing a representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis or the lawyer charges a fee for the legal assistance, the exceptions provided by this Rule no longer apply.

Imputation of Conflicts

5. Paragraph (b) provides that a conflict of interest arising from a lawyer's representation covered by this Rule will not be imputed to the lawyers in the pro bono lawyer's firm if the pro bono lawyer complies with subparagraphs (b)(1) and (2).

6. To prevent a conflict of interest arising from limited pro bono legal services from being imputed to the other lawyers in the firm, subparagraph (b)(1) requires that the pro bono lawyer not disclose to any lawyer in the firm any confidential information related to the pro bono representation.

7. Subparagraph (b)(2) covers the retention of documents or other memorialization of confidential information, such as the pro bono lawyer's notes, whether in paper or electronic form. To prevent imputation, a pro bono lawyer who retains confidential information is required by subparagraph (b)(2) to segregate and store it in such a way that no other lawyer in the pro bono lawyer's firm can access it, either physically or electronically.

Eligibility Information

8. Paragraph (c) recognizes the unusual and uniquely sensitive personal information that applicants for free legal assistance may be required to provide. Organizations that receive funding to provide free legal assistance to low-income clients are generally required, as a condition of their funding, to screen the applicants for eligibility and to document eligibility for services paid for by those funding sources. Unlike other lawyers, law firms, and legal departments, these organizations ask for confidential information to determine an applicant's eligibility for free legal assistance and are required to maintain records of such eligibility determinations for potential audit by their funding sources. Required eligibility information typically includes income, asset values, marital status, citizenship or immigration status, and other facts the applicant may consider sensitive.

9. The first situation where the paragraph (c) exception is available is where none of the eligibility information is material to an issue in the legal matter. Alternatively, under subparagraph (c)(2), if the applicant provided confidential information after giving informed consent that the eligibility information would not prohibit the persons or entities identified in the consent from representing any other present or future client, then the eligibility information alone will not prohibit the representation. The lawyer should document the receipt of such informed consent, though a formal writing is not required. What constitutes informed consent is discussed in the comments to Rule 1.06.

10. Rule 1.05 continues to apply to the use or disclosure of all confidential information provided during an intake interview. Similarly, Rule 1.09 continues to apply to the representation of a person in a matter

adverse to the applicant. Notably, Rule 1.05(c)(2) permits a lawyer to use or disclose information provided during an intake interview if the applicant consents after consultation to such use or disclosure, and Rule 1.09(a) excludes from its restrictions the representation of a person adverse to the applicant in the same or a substantially related matter if the applicant consents to such a representation.

Limited Pro Bono Legal Service Programs

11. This Rule applies only to services offered through a program that meets one of the descriptions in subparagraph (d)(1), regardless of the nature and amount of support provided. Some programs may be jointly sponsored by more than one of the listed sponsor types.

12. The second element of "limited pro bono legal services," set forth in subparagraph (d)(2), is designed to ensure that the services offered are so limited in time and scope that there is little risk that conflicts will arise between clients represented through the program and other clients of the lawyer or the lawyer's firm.

13. The third element of the definition, set forth in subparagraph (d)(3), is that the services are offered and provided without any expectation of either extended representation or the collection of legal fees in the matter. Before agreeing to proceed in the representation beyond "limited pro bono legal services," the lawyer should evaluate the potential conflicts of interest that may arise from the representation as with any other representation. Likewise, the exceptions in paragraphs (a) and (b) do not apply if the lawyer expects to collect any legal fees in the limited assistance matter.

Firm

14. Lawyers are not deemed to be part of the same firm simply because they volunteer through the same pro bono program. Nor will the personal prohibition of a lawyer participating in a pro bono program be imputed to other lawyers participating in the program solely by reason of that volunteer connection.

VII. INFORMATION ABOUT LEGAL SERVICES

Rule 7.01. Communications Concerning a Lawyer's Services

(a) A lawyer shall not make or sponsor a false or misleading communication about the qualifications or services of a lawyer or law firm. Information about legal services must be truthful and nondeceptive. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading. A statement is misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation, or if the statement is substantially likely to create unjustified expectations about the results the lawyer can achieve.

(b) This Rule governs all communications about a lawyer's services, including advertisements and

solicitation communications. For purposes of Rules 7.01 to 7.06:

> (1) An "advertisement" is a communication substantially motivated by pecuniary gain that is made by or on behalf of a lawyer to members of the public in general, which offers or promotes legal services under circumstances where the lawyer neither knows nor reasonably should know that the recipients need legal services in particular matters.
>
> (2) A "solicitation communication" is a communication substantially motivated by pecuniary gain that is made by or on behalf of a lawyer to a specific person who has not sought the lawyer's advice or services, which reasonably can be understood as offering to provide legal services that the lawyer knows or reasonably should know the person needs in a particular matter.

(c) Lawyers may practice law under a trade name that is not false or misleading. A law firm name may include the names of current members of the firm and of deceased or retired members of the firm, or of a predecessor firm, if there has been a succession in the firm identity. The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm. A law firm with an office in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(d) A statement or disclaimer required by these Rules shall be sufficiently clear that it can reasonably be understood by an ordinary person and made in each language used in the communication. A statement that a language is spoken or understood does not require a statement or disclaimer in that language.

(e) A lawyer shall not state or imply that the lawyer can achieve results in the representation by unlawful use of violence or means that violate these Rules or other law.

(f) A lawyer may state or imply that the lawyer practices in a partnership or other business entity only when that is accurate.

(g) If a lawyer who advertises the amount of a verdict secured on behalf of a client knows that the verdict was later reduced or reversed, or that the case was settled for a lesser amount, the lawyer must state in each advertisement of the verdict, with equal or greater prominence, the amount of money that was ultimately received by the client.

Comment:

1. This Rule governs all communications about a lawyer's services, including firm names, letterhead, and professional designations. Whatever means are used to make known a lawyer's services, statements about them must be truthful and not misleading. As subsequent provisions make clear, some rules apply only to "advertisements" or "solicitation communications." A statement about a lawyer's services falls within those categories only if it was "substantially motivated by pecuniary gain," which means that pecuniary

gain was a substantial factor in the making of the statement.

Misleading Truthful Statements

2. Misleading truthful statements are prohibited by this Rule. For example, a truthful statement is misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

Use of Actors

3. The use of an actor to portray a lawyer in a commercial is misleading if there is a substantial likelihood that a reasonable person will conclude that the actor is the lawyer who is offering to provide legal services. Whether a disclaimer—such as a statement that the depiction is a "dramatization" or shows an "actor portraying a lawyer"—is sufficient to make the use of an actor not misleading depends on a careful assessment of the relevant facts and circumstances, including whether the disclaimer is conspicuous and clear. Similar issues arise with respect to actors portraying clients in commercials. Such a communication is misleading if there is a substantial likelihood that a reasonable person will reach erroneous conclusions based on the dramatization.

Intent to Refer Prospective Clients to Another Firm

4. A communication offering legal services is misleading if, at the time a lawyer makes the communication, the lawyer knows or reasonably should know, but fails to disclose, that a prospective client responding to the communication is likely to be referred to a lawyer in another firm.

Unjustified Expectations

5. A communication is misleading if there is a substantial likelihood that it will create unjustified expectations on the part of prospective clients about the results that can be achieved. A communication that truthfully reports results obtained by a lawyer on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Depending on the facts and circumstances, the inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to mislead the public.

Required Statements and Disclaimers

6. A statement or disclaimer required by these Rules must be presented clearly and conspicuously such that it is likely to be noticed and reasonably understood by an ordinary person. In radio, television, and Internet advertisements, verbal statements must be spoken in a manner that their content is easily intelligible, and written statements must appear in a size and font, and for a sufficient length of time, that

a viewer can easily see and read the statements.

Unsubstantiated Claims and Comparisons

7. An unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with those of other lawyers or law firms, may be misleading if presented with such specificity as to lead a reasonable person to conclude that the comparison or claim can be substantiated.

Public Education Activities

8. As used in these Rules, the terms "advertisement" and "solicitation communication" do not include statements made by a lawyer that are not substantially motivated by pecuniary gain. Thus, communications which merely inform members of the public about their legal rights and about legal services that are available from public or charitable legal-service organizations, or similar non-profit entities, are permissible, provided they are not misleading. These types of statements may be made in a variety of ways, including community legal education sessions, know-your-rights brochures, public service announcements on television and radio, billboards, information posted on organizational social media sites, and outreach to low-income groups in the community, such as in migrant labor housing camps, domestic violence shelters, disaster resource centers, and dilapidated apartment complexes.

Web Presence

9. A lawyer or law firm may be designated by a distinctive website address, e-mail address, social media username or comparable professional designation that is not misleading and does not otherwise violate these Rules.

Past Success and Results

10. A communication about legal services may be misleading because it omits an important fact or tells only part of the truth. A lawyer who knows that an advertised verdict was later reduced, reversed, or never collected, or that the case was settled for a lesser amount, must disclose the amount actually received by the client with equal or greater prominence to avoid creating unjustified expectations on the part of potential clients. A lawyer may claim credit for a prior judgement or settlement only if the lawyer played a substantial role in obtaining that result. This standard is satisfied if the lawyer served as lead counsel or was primarily responsible for the settlement. In other cases, whether the standard is met depends on the facts. A lawyer who did not play a substantial role in obtaining an advertised judgment or settlement is subject to discipline for misrepresenting the lawyer's experience and, in some cases, for creating unjustified expectations about the results the lawyer can achieve.

Related Rules

11. It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or

misrepresentation. *See* Rule 8.04(a)(3); *see also* Rule 8.04(a)(5) (prohibiting communications stating or implying an ability to improperly influence a government agency or official).

Rule 7.02. Advertisements

(a) An advertisement of legal services shall publish the name of a lawyer who is responsible for the content of the advertisement and identify the lawyer's primary practice location.

(b) A lawyer who advertises may communicate that the lawyer does or does not practice in particular fields of law, but shall not include a statement that the lawyer has been certified or designated by an organization as possessing special competence or a statement that the lawyer is a member of an organization the name of which implies that its members possess special competence, except that:

> (1) a lawyer who has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised, may state with respect to each such area, "Board Certified, area of specialization -- Texas Board of Legal Specialization"; and
>
> (2) a lawyer who is a member of an organization the name of which implies that its members possess special competence, or who has been certified or designated by an organization as possessing special competence in a field of practice, may include a factually accurate, non-misleading statement of such membership or certification, but only if that organization has been accredited by the Texas Board of Legal Specialization as a bona fide organization that admits to membership or grants certification only on the basis of published criteria which the Texas Board of Legal Specialization has established as required for such certification.

(c) If an advertisement by a lawyer discloses a willingness to render services on a contingent fee basis, the advertisement must state whether the client will be obligated to pay for other expenses, such as the costs of litigation.

(d) A lawyer who advertises a specific fee or range of fees for an identified service shall conform to the advertised fee or range of fees for the period during which the advertisement is reasonably expected to be in circulation or otherwise expected to be effective in attracting clients, unless the advertisement specifies a shorter period. However, a lawyer is not bound to conform to the advertised fee or range of fees for a period of more than one year after the date of publication, unless the lawyer has expressly promised to do so.

Comment:

1. These Rules permit the dissemination of information that is not false or misleading about a lawyer's or law firm's name, address, e-mail address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language abilities; names of references and, with their consent, names of clients regularly represented; and other similar information that might

invite the attention of those seeking legal assistance.

Communications about Fields of Practice

2. Lawyers often benefit from associating with other lawyers for the development of practice areas. Thus, practitioners have established associations, organizations, institutes, councils, and practice groups to promote, discuss, and develop areas of the law, and to advance continuing education and skills development. While such activities are generally encouraged, participating lawyers must refrain from creating or using designations, titles, or certifications which are false or misleading. A lawyer shall not advertise that the lawyer is a member of an organization whose name implies that members possess special competence, unless the organization meets the standards of Rule 7.02(b). Merely stating a designated class of membership, such as Associate, Master, Barrister, Diplomate, or Advocate, does not, in itself, imply special competence violative of these Rules.

3. Paragraph (b) of this Rule permits a lawyer to communicate that the lawyer practices, focuses, or concentrates in particular areas of law. Such communications are subject to the "false and misleading" standard applied by Rule 7.01 to communications concerning a lawyer's services and must be objectively based on the lawyer's experience, specialized training, or education in the area of practice.

4. The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer's communications about these practice areas are not prohibited by this Rule.

Certified Specialist

5. This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by the Texas Board of Legal Specialization or by an organization that applies standards of experience, knowledge and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable, if the organization is accredited by the Texas Board of Legal Specialization. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Rule 7.03. Solicitation and Other Prohibited Communications

(a) The following definitions apply to this Rule:

(1) "Regulated telephone, social media, or other electronic contact" means telephone, social media, or electronic communication initiated by a lawyer, or by a person acting on behalf of a lawyer, that involves communication in a live or electronically interactive manner.

(2) A lawyer "solicits" employment by making a "solicitation communication," as that term is

defined in Rule 7.01(b)(2).

(b) A lawyer shall not solicit through in-person contact, or through regulated telephone, social media, or other electronic contact, professional employment from a non-client, unless the target of the solicitation is:

(1) another lawyer;

(2) a person who has a family, close personal, or prior business or professional relationship with the lawyer; or

(3) a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters.

(c) A lawyer shall not send, deliver, or transmit, or knowingly permit or cause another person to send, deliver, or transmit, a communication that involves coercion, duress, overreaching, intimidation, or undue influence.

(d) A lawyer shall not send, deliver, or transmit, or knowingly permit or cause another person to send, deliver, or transmit, a solicitation communication to a prospective client, if:

(1) the communication is misleadingly designed to resemble a legal pleading or other legal document; or

(2) the communication is not plainly marked or clearly designated an "ADVERTISEMENT" unless the target of the communication is:

(i) another lawyer;

(ii) a person who has a family, close personal, or prior business or professional relationship with the lawyer; or

(iii) a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters.

(e) A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting or referring prospective clients for professional employment, except nominal gifts given as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

(1) This Rule does not prohibit a lawyer from paying reasonable fees for advertising and public relations services or the usual charges of a lawyer referral service that meets the requirements of Texas law.

(2) A lawyer may refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive;

(ii) clients are informed of the existence and nature of the agreement; and

(iii) the lawyer exercises independent professional judgment in making referrals.

(f) A lawyer shall not, for the purpose of securing employment, pay, give, advance, or offer to pay, give, or advance anything of value to a prospective client, other than actual litigation expenses and other financial assistance permitted by Rule 1.08(d), or ordinary social hospitality of nominal value.

(g) This Rule does not prohibit communications authorized by law, such as notice to members of a class in class action litigation.

Comment:

Solicitation by Public and Charitable Legal Services Organizations

1. Rule 7.01 provides that a "'solicitation communication' is a communication substantially motivated by pecuniary gain." Therefore, the ban on solicitation imposed by paragraph (b) of this Rule does not apply to the activities of lawyers working for public or charitable legal services organizations.

Communications Directed to the Public or Requested

2. A lawyer's communication is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is made in response to a request for information, including an electronic search for information. The terms "advertisement" and "solicitation communication" are defined in Rule 7.01(b).

The Risk of Overreaching

3. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services via in-person or regulated telephone, social media, or other electronic contact. These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

4. The potential for overreaching that is inherent in in-person or regulated telephone, social media, or other electronic contact justifies their prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be sent by regular mail or e-mail, or by other means that do not involve communication in a live or electronically interactive manner. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, with minimal risk of overwhelming a person's judgment.

5. The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

Targeted Mail Solicitation

6. Regular mail or e-mail targeted to a person that offers to provide legal services that the lawyer knows or reasonably should know the person needs in a particular matter is a solicitation communication within the meaning of Rule 7.01(b)(2), but is not prohibited by subsection (b) of this Rule. Unlike in-person and electronically interactive communication by "regulated telephone, social media, or other electronic contact," regular mail and e-mail can easily be ignored, set aside, or reconsidered. There is a diminished likelihood of overreaching because no lawyer is physically present and there is evidence in tangible or electronic form of what was communicated. *See Shapero v. Kentucky B. Ass'n*, 486 U.S. 466 (1988).

Personal, Family, Business, and Professional Relationships

7. There is a substantially reduced likelihood that a lawyer would engage in overreaching against a former client, a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent an entity; entrepreneurs who regularly engage business, employment law, or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations.

Constitutionally Protected Activities

8. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee, or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries. *See In re Primus*, 436 U.S. 412 (1978).

Group and Prepaid Legal Services Plans

9. This Rule does not prohibit a lawyer from contacting representatives of organizations or entities that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries, or other third parties. Such communications may provide information about the availability and terms of a plan which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to persons who are seeking legal services for themselves. Rather, it is usually addressed to a fiduciary seeking a supplier of legal services for others, who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the information transmitted is functionally similar to the types of advertisements permitted by these Rules.

Designation as an Advertisement

10. For purposes of paragraph (d)(2) of this Rule, a communication is rebuttably presumed to be "plainly marked or clearly designated an 'ADVERTISEMENT'" if: (a) in the case of a letter transmitted in an envelope, both the outside of the envelope and the first page of the letter state the word "ADVERTISEMENT" in bold face all-capital letters that are 3/8" high on a uncluttered background; (b) in the case of an e-mail message, the first word in the subject line is "ADVERTISEMENT" in all capital letters; and (c) in the case of a text message or message on social media, the first word in the message is "ADVERTISEMENT" in all capital letters.

Paying Others to Recommend a Lawyer

11. This Rule allows a lawyer to pay for advertising and communications, including the usual costs of printed or online directory listings or advertisements, television and radio airtime, domain-name registrations, sponsorship fees, and group advertising. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons, and website designers.

12. This Rule permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement, or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

13. A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rule 5.04(a) (division of fees with nonlawyers) and Rule 5.04(c) (nonlawyer interference with the professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.01 (communications concerning a lawyer's services). To comply with Rule 7.01, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal

problems when determining which lawyer should receive the referral. *See also* Rule 5.03 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.04(a)(1) (duty to avoid violating the Rules through the acts of another).

Charges of and Referrals by a Legal Services Plan or Lawyer Referral Service

14. A lawyer may pay the usual charges of a legal services plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Qualified referral services are consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements.

15. A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association.

Reciprocal Referral Arrangements

16. A lawyer does not violate paragraph (e) of this Rule by agreeing to refer clients to another lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive, the client is informed of the referral agreement, and the lawyer exercises independent professional judgment in making the referral. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. A lawyer should not enter into a reciprocal referral agreement with another lawyer that includes a division of fees without determining that the agreement complies with Rule 1.04(f).

Meals or Entertainment for Prospective Clients

17. This Rule does not prohibit a lawyer from paying for a meal or entertainment for a prospective client that has a nominal value or amounts to ordinary social hospitality.

Rule 7.04. Filing Requirements for Advertisements and Solicitation Communications

(a) Except as exempt under Rule 7.05, a lawyer shall file with the Advertising Review Committee, State Bar of Texas, no later than ten (10) days after the date of dissemination of an advertisement of legal services, or ten (10) days after the date of a solicitation communication sent by any means:

(1) a copy of the advertisement or solicitation communication (including packaging if applicable) in the form in which it appeared or will appear upon dissemination;

(2) a completed lawyer advertising and solicitation communication application; and

(3) payment to the State Bar of Texas of a fee authorized by the Board of Directors.

(b) If requested by the Advertising Review Committee, a lawyer shall promptly submit information to substantiate statements or representations made or implied in an advertisement or solicitation communication.

(c) A lawyer who desires to secure pre-approval of an advertisement or solicitation communication may submit to the Advertising Review Committee, not fewer than thirty (30) days prior to the date of first dissemination, the material specified in paragraph (a), except that in the case of an advertisement or solicitation communication that has not yet been produced, the documentation will consist of a proposed text, production script, or other description, including details about the illustrations, actions, events, scenes, and background sounds that will be depicted. A finding of noncompliance by the Advertising Review Committee is not binding in a disciplinary proceeding or action, but a finding of compliance is binding in favor of the submitting lawyer as to all materials submitted for pre-approval if the lawyer fairly and accurately described the advertisement or solicitation communication that was later produced. A finding of compliance is admissible evidence if offered by a party.

Comment:

1. The Advertising Review Committee shall report to the appropriate disciplinary authority any lawyer whom, based on filings with the Committee, it reasonably believes disseminated a communication that violates Rules 7.01, 7.02, or 7.03, or otherwise engaged in conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. *See* Rule 8.03(a).

Multiple Solicitation Communications

2. Paragraph (a) does not require that a lawyer submit a copy of each written solicitation letter a lawyer sends. If the same form letter is sent to several persons, only a representative sample of each form letter, along with a representative sample of the envelopes used to mail the letters, need be filed.

Requests for Additional Information

3. Paragraph (b) does not empower the Advertising Review Committee to seek information from a lawyer to substantiate statements or representations made or implied in communications about legal services that were not substantially motivated by pecuniary gain.

Rule 7.05. Communications Exempt from Filing Requirements

The following communications are exempt from the filing requirements of Rule 7.04 unless they fail to comply with Rules 7.01, 7.02, and 7.03:

(a) any communication of a bona fide nonprofit legal aid organization that is used to educate members of the public about the law or to promote the availability of free or reduced-fee legal services;

(b) information and links posted on a law firm website, except the contents of the website homepage, unless that information is otherwise exempt from filing;

(c) a listing or entry in a regularly published law list;

(d) an announcement card stating new or changed associations, new offices, or similar changes relating to a lawyer or law firm, or a business card;

(e) a professional newsletter in any media that it is sent, delivered, or transmitted only to:

(1) existing or former clients;

(2) other lawyers or professionals;

(3) persons known by the lawyer to be experienced users of the type of legal services involved for business matters;

(4) members of a nonprofit organization which has requested that members receive the newsletter; or

(5) persons who have asked to receive the newsletter;

(f) a solicitation communication directed by a lawyer to:

(1) another lawyer;

(2) a person who has a family, close personal, or prior business or professional relationship with the lawyer; or

(3) a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters;

(g) a communication in social media or other media, which does not expressly offer legal services, and that:

(1) is primarily informational, educational, political, or artistic in nature, or made for entertainment purposes; or

(2) consists primarily of the type of information commonly found on the professional resumes of lawyers;

(h) an advertisement that:

(1) identifies a lawyer or a firm as a contributor or sponsor of a charitable, community, or public interest program, activity, or event; and

(2) contains no information about the lawyers or firm other than names of the lawyers or firm or both, location of the law offices, contact information, and the fact of the contribution or sponsorship;

(i) communications that contain only the following types of information:

(1) the name of the law firm and any lawyer in the law firm, office addresses, electronic addresses, social media names and addresses, telephone numbers, office and telephone service hours, telecopier numbers, and a designation of the profession, such as "attorney," "lawyer," "law office," or "firm;"

(2) the areas of law in which lawyers in the firm practice, concentrate, specialize, or intend to practice;

(3) the admission of a lawyer in the law firm to the State Bar of Texas or the bar of any court or jurisdiction;

(4) the educational background of the lawyer;

(5) technical and professional licenses granted by this state and other recognized licensing authorities;

(6) foreign language abilities;

(7) areas of law in which a lawyer is certified by the Texas Board of Legal Specialization or by an organization that is accredited by the Texas Board of Legal Specialization;

(8) identification of prepaid or group legal service plans in which the lawyer participates;

(9) the acceptance or nonacceptance of credit cards;

(10) fees charged for an initial consultation or routine legal services;

(11) identification of a lawyer or a law firm as a contributor or sponsor of a charitable, community, or public interest program, activity or event;

(12) any disclosure or statement required by these Rules; and

(13) any other information specified in orders promulgated by the Supreme Court of Texas.

Comment:

1. This Rule exempts certain types of communications from the filing requirements of Rule 7.04. Communications that were not substantially motivated by pecuniary gain do not need to be filed.

Website-Related Filings

2. While the entire website of a lawyer or law firm must be compliant with Rules 7.01 and 7.02, the only material on the website that may need to be filed pursuant to this Rule is the contents of the homepage. However, even a homepage does not need to be filed if the contents of the homepage are exempt from filing under the provisions of this Rule. Under Rule 7.04(c), a lawyer may voluntarily seek pre-approval of any material that is part of the lawyer's website.

Rule 7.06. Prohibited Employment

(a) A lawyer shall not accept or continue employment in a matter when that employment was procured by conduct prohibited by Rules 7.01 through 7.03, 8.04(a)(2), or 8.04(a)(9), engaged in by that lawyer personally or by another person whom the lawyer ordered, encouraged, or knowingly permitted to engage in such conduct.

(b) A lawyer shall not accept or continue employment in a matter when the lawyer knows or reasonably should know that employment was procured by conduct prohibited by Rules 7.01 through 7.03, 8.04(a)(2), or 8.04(a)(9), engaged in by another person or entity that is a shareholder, partner, or member of, an associate in, or of counsel to that lawyer's firm; or by any other person whom the foregoing persons or entities ordered, encouraged, or knowingly permitted to engage in such conduct.

(c) A lawyer who has not violated paragraph (a) or (b) in accepting employment in a matter shall not continue employment in that matter once the lawyer knows or reasonably should know that the person procuring the lawyer's employment in the matter engaged in, or ordered, encouraged, or knowingly permitted another to engage in, conduct prohibited by Rules 7.01 through 7.03, 8.04(a)(2), or 8.04(a)(9) in connection with the matter unless nothing of value is given thereafter in return for that employment.

Comment:

1. This Rule deals with three different situations: personal disqualification, imputed disqualification, and

referral-related payments.

Personal Disqualification

2. Paragraph (a) addresses situations where the lawyer in question has violated the specified advertising rules or other provisions dealing with serious crimes and barratry. The Rule makes clear that the offending lawyer cannot accept or continue to provide representation. This prohibition also applies if the lawyer ordered, encouraged, or knowingly permitted another to violate the Rules in question.

Imputed Disqualification

3. Second, paragraph (b) addresses whether other lawyers in a firm can provide representation if a person or entity in the firm has violated the specified advertising rules or other provisions dealing with serious crimes and barratry, or has ordered, encouraged, or knowingly permitted another to engage in such conduct. The Rule clearly indicates that the other lawyers cannot provide representation if they knew or reasonably should have known that the employment was procured by conduct prohibited by the stated Rules. This effectively means that, in such cases, the disqualification that arises from a violation of the advertising rules and other specified provisions is imputed to other members of the firm.

Restriction on Referral-Related Payments

4. Paragraph (c) deals with situations where a lawyer knows or reasonably should know that a case referred to the lawyer or the lawyer's law firm was procured by violation of the advertising rules or other specified provisions. The Rule makes clear that, even if the lawyer's conduct did not violate paragraph (a) or (b), the lawyer can continue to provide representation only if the lawyer does not pay anything of value, such as a referral fee, to the person making the referral.

VIII. MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.01. Bar Admission, Reinstatement, and Disciplinary Matters

An applicant for admission to the bar, a petitioner for reinstatement to the bar, or a lawyer in connection with a bar admission application, a petition for reinstatement, or a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admission, reinstatement, or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.05.

Comment:

1. The duty imposed by this Rule extends to persons seeking admission or reinstatement to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission or a petition for reinstatement, it may be the basis for subsequent disciplinary action if the person is admitted or reinstated, and in any event may be relevant in any subsequent application for admission or petition for reinstatement. The duty imposed by this Rule applies to a lawyer's own admission, reinstatement or discipline as well as that of others. Thus, for example, it is a separate professional offense for a lawyer to knowingly make a material misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Likewise, it is a separate professional offense for a lawyer to fail to respond to a lawful demand for information of a disciplinary authority inquiring into that lawyer's professional activities or conduct. Cf. State Bar Rules, art. X, sec. 7(4). This Rule also requires affirmative clarification of any misunderstanding on the part of the admissions, reinstatement or disciplinary authority of which the person involved becomes aware.

2. This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of Article 1, Section 10 of the Texas Constitution. A person relying on such a provision in response to a specific question or more general demand for information, however, should do so openly and not use the right of nondisclosure as an unasserted justification for failure to comply with this Rule. Cf. State Bar Rules, art. X, sec. 7(4).

3. A lawyer representing an applicant for admission or petitioner for reinstatement to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including those concerning the confidentiality of attorney-client communications. If such communications are protected under Rule 1.05, the lawyer need not and should not disclose them under this Rule. See also Rule 8.03(c).

Rule 8.02. Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory official or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Texas Code of Judicial Conduct.

(c) A lawyer who is a candidate for an elective public office shall comply with the applicable provisions of the Texas Election Code.

Comment:

1. Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney

general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

2. When a lawyer seeks judicial or other elective public office, the lawyer should be bound by applicable limitations on political activity.

3. To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Rule 8.03. Reporting Professional Misconduct

(a) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority.

(b) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) A lawyer having knowledge or suspecting that another lawyer or judge whose conduct the lawyer is required to report pursuant to paragraphs (a) or (b) of this Rule is impaired by chemical dependency on alcohol or drugs or by mental illness may report that person to an approved peer assistance program rather than to an appropriate disciplinary authority. If a lawyer elects that option, the lawyer's report to the approved peer assistance program shall disclose any disciplinary violations that the reporting lawyer would otherwise have to disclose to the authorities referred to in paragraphs (a) and (b).

(d) This rule does not require disclosure of knowledge or information otherwise protected as confidential information:

(1) by Rule 1.05 or

(2) by any statutory or regulatory provisions applicable to the counseling activities of the approved peer assistance program.

(e) A lawyer who has been convicted or placed on probation, with or without an adjudication of guilt, by any court for barratry, any felony, or for a misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property—including a conviction or sentence of probation for attempt, conspiracy, or solicitation—must notify the chief disciplinary counsel within 30 days of the date of the order or judgment. The notice must include a copy of the order or judgment.

(f) A lawyer who has been disciplined by the attorney-regulatory agency of another jurisdiction, or by a federal court or federal agency, must notify the chief disciplinary counsel within 30 days of the date of the order or judgment. The notice must include a copy of the order or judgment. For purposes of this paragraph, "discipline" by a federal court or federal agency means a public reprimand, suspension, or disbarment; the term does not include a letter of "warning" or "admonishment" or a similar advisory by a federal court or federal agency.

Comment:

1. Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigations when they have knowledge not protected by Rule 1.05 that a violation of these rules has occurred. Lawyers have a similar obligation with respect to judicial misconduct. Frequently, the existence of a violation cannot be established with certainty until a disciplinary investigation has been undertaken. Similarly, an apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Consequently, a lawyer should not fail to report an apparent disciplinary violation merely because he cannot determine its existence or scope with absolute certainty. Reporting a violation is especially important where the victim is unlikely to discover the offense.

2. It should be noted that this Rule describes only those disciplinary violations that must be revealed by the disclosing lawyer in order to avoid violating these rules himself. It is not intended to, nor does it, limit those actual or suspected violations that a lawyer may report. However, if a lawyer were obliged to report every violation of these rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. Similar considerations apply to the reporting of judicial misconduct. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. The term "fitness" has the meanings ascribed to it in the Terminology provisions of these Rules.

3. A report of professional misconduct by a lawyer should be made and processed in accordance with Article X of the State Bar Rules. A lawyer need not report misconduct where the report would involve a violation of Rule 1.05. However, a lawyer should encourage a client to consent to disclosure where prosecution of the violation would not substantially prejudice the client's interests. Likewise, the duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose past professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

4. Paragraphs (e) and (f) are added under section 81.081 of the Government Code.

Rule 8.04. Misconduct

(a) A lawyer shall not:

(1) violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not the violation occurred in the course of a client-lawyer relationship;

(2) commit a serious crime or commit any other criminal act that reflects adversely on the lawyers honesty, trustworthiness or fitness as a lawyer in other respects;

(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(4) engage in conduct constituting obstruction of justice;

(5) state or imply an ability to influence improperly a government agency or official;

(6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(7) violate any disciplinary or disability order or judgment;

(8) fail to timely furnish to the Chief Disciplinary Counsels office or a district grievance committee a response or other information as required by the Texas Rules of Disciplinary Procedure, unless he or she in good faith timely asserts a privilege or other legal ground for failure to do so;

(9) engage in conduct that constitutes barratry as defined by the law of this state;

(10) fail to comply with section 13.01 of the Texas Rules of Disciplinary Procedure relating to notification of an attorneys cessation of practice;

(11) engage in the practice of law when the lawyer is on inactive status, except as permitted by section 81.053 of the Government Code and Article XIII of the State Bar Rules, or when the lawyers right to practice has been suspended or terminated, including, but not limited to, situations where a lawyer's right to practice has been administratively suspended for failure to timely pay required fees or assessments or for failure to comply with Article XII of the State Bar Rules relating to Mandatory Continuing Legal Education; or

(12) violate any other laws of this state relating to the professional conduct of lawyers and to the practice of law.

(b) As used in subsection (a)(2) of this Rule, "serious crime" means barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes.

Comment:

1. There are four principal sources of professional obligations for lawyers in Texas: these rules, the State Bar Act, the State Bar Rules, and the Texas Rules of Disciplinary Procedure (TRDP). All lawyers are presumed to know the requirements of these sources. Rule 8.04(a)(1) provides a partial list of conduct that will subject a lawyer to discipline.

2. Many kinds of illegal conduct reflect adversely on fitness to practice law. However, some kinds of offenses carry no such implication. Traditionally in this state, the distinction has been drawn in terms of those crimes subjecting a lawyer to compulsory discipline, criminal acts relevant to a lawyer's fitness for the practice of law, and other offenses. Crimes subject to compulsory discipline are governed by TRDP, Part VIII. In addition, although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for criminal acts that indicate a lack of those characteristics relevant to the lawyer's fitness for the practice of law. A pattern of repeated criminal acts, even ones of minor significance when considered separately, can indicate indifference to legal obligations that legitimately could call a lawyer's overall fitness to practice into question. See TRDP, Part VIII; Rule 8.04(a)(2).

3. A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief, openly asserted, that no valid obligation exists. The provisions of Rule 1.02(c) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges to legal regulation of the practice of law.

4. Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust.

Rule 8.05. Jurisdiction

(a) A lawyer is subject to the disciplinary authority of this state, if admitted to practice in this state or if specially admitted by a court of this state for a particular proceeding. In addition to being answerable for his or her conduct occurring in this state, any such lawyer also may be disciplined here for conduct occurring in another jurisdiction or resulting in lawyer discipline in another jurisdiction, if it is professional misconduct under Rule 8.04.

(b) A lawyer admitted to practice in this state is also subject to the disciplinary authority for:

(1) an advertisement in the public media that does not comply with these rules and that is

broadcast or disseminated in another jurisdiction, even if the advertisement complies with the rules governing lawyer advertisements in that jurisdiction, if the broadcast or dissemination of the advertisement is intended to be received by prospective clients in this state and is intended to secure employment to be performed in this state; and

(2) a written solicitation communication that does not comply with these rules and that is mailed in another jurisdiction, even if the communication complies with the rules governing written solicitation communications by lawyers in that jurisdiction, if the communication is mailed to an addressee in this state or is intended to secure employment to be performed in this state.

Comment:

1. This Rule describes those lawyers who are subject to the disciplinary authority of this state. It includes all lawyers licensed to practice here, as well as lawyers admitted specially for a particular proceeding. This Rule is not intended to have any effect on the powers of a court to punish lawyers for contempt or for other breaches of applicable rules of practice or procedure.

2. In modern practice lawyers licensed in Texas frequently act outside the territorial limits or judicial system of this state. In doing so, they remain subject to the governing authority of this state. If their activity in another jurisdiction is substantial and continuous, it may constitute the practice of law in that jurisdiction. See Rule 5.05.

3. If the rules of professional conduct of this state and that other jurisdiction differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction and these jurisdictions impose conflicting obligations. A related problem arises with respect to practice before a federal tribunal, where the general authority of the state to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them. In such cases, this state will not impose discipline for conduct arising in connection with the practice of law in another jurisdiction or resulting in lawyer discipline in another jurisdiction unless that conduct constitutes professional misconduct under Rule 8.04.

4. Normally, discipline will not be imposed in this state for conduct occurring solely in another jurisdiction or judicial system and authorized by the rules of professional conduct applicable thereto, even if that conduct would violate these Rules.

IX. SEVERABILITY OF RULES

Rule 9.01. Severability

If any provision of these rules or any application of these rules to any person or circumstances is held invalid, such invalidity shall not affect any other provision or application of these rules that can be given effect without the invalid provision or application and, to this end, the provisions of these rules are severable.

Comment:

The history of the regulation of American lawyers is replete with challenges to various rules on grounds of unconstitutionality. Because many of these Rules, particularly those in Article VII, are interrelated to an extent, the voiding of a particular rule or of a single provision in a rule could raise questions as to whether other provisions should survive. Rule 9.01 makes it clear that these Rules should be construed so as to minimize the effect of a determination that a particular application or provision of them is unconstitutional. The process of amending the Texas Disciplinary Rules of Professional Conduct is unusually difficult and time consuming and a decision invalidating one provision or application of a rule should not be expanded unnecessarily so as to invalidate other provisions or applications. These Disciplinary Rules have the specificity found in statutes, and it is appropriate for Rule 9.01 to contain a provision, frequently found in legislation, that reasonably limits the effect of the invalidity of one provision or one application of a rule.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

Brian P. Carr, Rueangrong Carr, and Buakhao Von Kramer Plaintiffs versus United States, US Department of Justice, USPS, USPS OIG, USPS BoG, US CIGIE, Department of State, Department of State OIG, USCIS, DHS OIG, and SSA Defendants	Civil No. 3-23CV2875 - S Affirmation Supporting Creative Sanctions

Affirmation Supporting Creative Sanctions

Meritless Pleadings Too Common, Creative Alternatives Required

Mr. Carr complains about numerous false and misleading statements by Mr. Padis as well as numerous pleadings which were totally devoid of merit and clearly indicative that Mr. Padis was just trying to delay this matter.

However, Mr. Carr is not implying or inferring that Mr. Padis has any malicious or malevolent intent. Mr. Carr assumes that Mr. Padis has too many cases and not enough time to properly respond to all of them in a timely fashion. Unfortunately, the normal response to this is to juggle cases, making minimal responses as required to push off the deadline for each case until the next deadline.

This juggling of cases is not improper per se. However, if it leads to generating meritless Rule 56(d) Motions (as herein) or Motions to Dismiss, then it needlessly

wastes the time of both court and the other parties to the case.

https://www.law.cornell.edu/uscode/text/28/1927

Mr. Padis has informally defended his pleadings claiming that 'everybody does it', which could well be the case, but that does not negate the need for creative sanctions to deter pleadings which waste the time of the court and other parties.

Community Service as an Alternative When Costs Not Applicable

In this regard, this court is asked to consider holding Mr. Padis personally liable for community service based on 28 USC section 1927 which states:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

as well as FRCP Rule 56(h) Summary Judgment, Bad Faith which states:

> Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court - after notice and a reasonable time to respond - may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or **subjected to other appropriate sanctions**.[1]

FRCP Rule 11includes:

> (b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper - whether by signing, filing, submitting, or

1 Bold added by Plaintiffs.

> later advocating it - an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.
>
> (c) Sanctions. …
>
> (3) On the Court's Initiative. On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b) has been violated, **the court may impose an appropriate sanction**[2] on any attorney, law firm, or party that violated the rule or is responsible for the violation.

In that regard, Mr. Carr is retired and not averse to community service. Mr. Padis personal time is significantly more limited and the cost of Mr. Padis' professional time is loaded (with significant adjustments for training, experience and supporting staff and facilities). As such Mr. Carr is suggesting a factor of four such that for every four hours of Mr. Carr's time wasted preparing defenses against spurious

2 Bold added by Plaintiffs.

filings by Mr. Padis, Mr. Padis should be required to provide the community with one hour of community service (personal time to be clear). This could be in the form of Pro Bono legal aid (perhaps helping indigents caught up in Texas SB4 in Texas courts if SB4 becomes law and the U.S. government is not a party to the matter), but any form of the well established community service would be sufficient.

Similarly, if Mr. Carr files meritless pleadings, Mr. Carr would readily accept a requirement for community service at the same ration of 4 hours of community service for every hour USATXN spends defending against the pleadings.

Creative Requirement for Early Filings to Balance Delays

If the court finds sufficient grounds, the Court could compute the inappropriate delay and require USATXN file all future papers early, in half the normal time allotted with a four day minimum until the computed delay is reversed.

For example, a Response due in 21 days would be due in 11 days. If the Response was filed in 9 days, that would be a credit of 12 days reducing the remaining days of early filings. If, however, with or without leave of the court the filing was made in 13 days, 2 days would be added to remaining balance. Mr. Carr can submit a possible worksheet / formula for computing delay and reversal though the actual sanctions are clearly a matter of court's discretion.

Mr. Carr hereby affirms under penalty of perjury in both the United States and Thailand that as an individual:

> I have reviewed the above affirmation and believe all of the statements to be true to the best of my knowledge.

I hereby reaffirm that the above is true to the best of my knowledge under penalty of perjury in both the United States and Thailand.

/s Brian P. Carr

_____

Brian P. Carr
1201 Brady Dr

Irving, TX 75061

Date: 8 May 2024

Location: Irving, Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

Brian P. Carr, Rueangrong Carr, and Buakhao Von Kramer Plaintiffs versus United States, US Department of Justice, USPS, USPS OIG, USPS BoG, US CIGIE, Department of State, Department of State OIG, USCIS, DHS OIG, and SSA Defendants	Civil No. 3-23CV2875 - S Affirmation of Unethical Behavior Seeking Delays

Affirmation of Unethical Behavior Seeking Delays

In an exchange of emails with Mr. Carr, Mr. Padis made false statements which violated TXND LR 83.8 (b)(3) 'Unethical Behavior' and Texas Disciplinary Rules of Professional Conduct (in in ECF 30-2) requirement of 'Truthfulness in Statements to Others' and 18 USC Section 1001 (falsification of government records, i.e. government emails).

It will be made clear the underlying purpose of the false statements was to seek a delay. The initial email exchange can be seen in ECF 28-1, a Redacted Email Thread 1 Mar 24 to 18 Apr 24.

Initial Email Claimed No Record of Service

On 1 Mar 2024 Mr. Padis sent an email to Mr. Carr stating:

> Dear Mr. Carr:
> I am the Deputy Civil Chief for the Northern District of Texas. I have been made aware of the above-captioned civil action, but **the U.S. Attorney's Office has no record of having been served in this case**.[1] See Fed. R. Civ. P. 4(i)(1)(A) (requiring that among other things a party must deliver a copy of the summons and the complaint to the United States attorney).
>
> If you reply with a summons and a copy of the complaint, I will email you a letter confirming that I am accepting service on behalf of the U.S. Attorney. Please note that my authority to accept service is limited to the United States attorney, and I am not authorized to accept service for the Attorney General of the United States.
>
> Truly yours,
>
> George (Deputy Civil Chief, USAO NDTX)

Mr. Carr recognized the claim of the 'Office has no record of having been served in this case' as an obvious logical fallacy and also false as Mr. Carr had filed Proof of Service on 9 Jan 2024 with the court (see ECF 10) which included mailing the US Attorney via certified mail a copy of the summons and complaint (complying with FRCP Rule 4(i)(1)(A) which includes '... or (ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;'

Mr. Carr responded on 3 Mar 2024 with:

> Thank you for contacting me about your lack of access to the Summons and Complaint in this matter (and the lack of record of service). I am sorry that your office seems to have misplaced the copies of the Summons and Complaints which were correctly served on 09 Jan 2024.
>
> I have attached a copy of the service document as Doc10service.pdf for your

1 Bold added by Plaintiffs

> convenience which was retrieved from ECF as Doc 10. ...
>
> Of course I find working with paper copies most tedious and so recommend you access Doc 11-1 which is an electronic copy of the Complaint. I attempted to share that document with you directly but as your email is not registered with google for google drive access, that wasn't possible. However, I shared the folder with all the ECF files to date as 'eDocket' on Google Drive and the Complaint itself is an exhibit to Doc 11, Doc 11-1 which is available on Google Drive for no fee.
>
> I am sorry that you were brought into this so late, but I believe that as service was completed on 9 Jan 2024, you have until 11 Mar 2024 to respond. I appreciate that this is not a lot of time (only a week really). You might consider asking for an extension to answer in this matter as the Summons and Complaint seem to have been misdirected in your office, but I would oppose any extension unless some relief was provided for my wife...
>
> **Mr. Carr Asks for Assistance Getting Promised Relief from USCIS.**

Mr. Carr went on to describe how USCIS had unlawfully left his wife stranded in Thailand. When she was able to return she had a joint interview and her I-751 application for a 10 year 'green card' was approved as well as her N-400 application for citizenship. She need only take the 'Oath of Allegiance' and she would get Certificate of Naturalization citing ECF 10-5 dated 31 Jan 2023 and paragraph 163 of the complaint (ECF 11-1, 18-1, and 29).

However, at this time (more than a year later) Mrs. Carr has no documentation from USCIS to prove her permanent resident status and was being deprived of her right to work and travel freely (e.g. being stranded in Thailand) which causes her a great fear of being deported without notice or due process (Texas Bill SB4 was

briefly active during this time and is still pending). She also can not vote (after her N-400 was approved) or benefit from the other rights of being a U.S. citizen such as helping her older son in Thailand find good work (Thailand is still suffering from the Covid shutdowns).

Mr. Carr offered an extension to USATXN if Mr. Padis would join in a Motion to get Mrs. Carr her approved green card (so she could work and travel freely) and her Certificate of Naturalization (so she could vote and get the other privileges of citizenship) but Mr. Padis instead promised a 'timely response'. This 'timely response' was the usual 'Motion to Dismiss' but the motion itself was of such low quality (not addressing the actual complaint but instead addressing some imaginary complaint that exists only in Mr. Padis' mind) that no progress has been made in resolving any issue after a delay of two months.

That is two months of Mrs. Carr being deprived of her right to work and travel freely as well as the rights of citizenship from the USCIS decision of 31 Jan 2023.

Mr. Padis Looked for Flaws in Service

On 4 Mar 2024 Mr. Padis wrote:

> Mr. Carr,
> Thank you for your response. We will get our response to your complaint on file in a timely manner. Do you know who / Was it you who handed the packet to the receptionist and observed the conversation between the receptionist and Mr. Barr?
> Thanks again,
> George

It is worth noting that while Mr. Padis had promised to send a letter accepting service if Mr. Carr sent him a copy of the Summons and Complaint, but when Mr. Carr sent the requested documents Mr. Padis did not send the promised letter accepting service. The purported offer of a letter was just part of Mr. Padis ruse to get some sort of delay.

Later on 4 Mar 2024 Mr. Carr wrote:

> Mr. Padis,
> Thanks for ensuring a timely response in this matter. To be precise, Mr. Barr, Mr. Joubert, the receptionist, and I were present at the time of service. Mr. Joubert handed the packet to Mr. Barr and Mr. Barr handed us (myself) a copy of his business card. As Mr. Joubert and I were discussing the completion of the affirmation of service, Mr. Barr walked to the receptionist window and slid the packet through the slot at the bottom (so he did not actually hand the packet to her as I misstated previously). At that time I overheard some discussion of what she should do with the packet. It is also my recollection that the receptionist was a person of color, possibly with some African heritage and a little heavy.
>
> There almost certainly were videos of the service (given the security of the office) but I am not sure if the videos would be retained or be easily accessible. I strive to be accurate in all things but would be interested to see whether my recollection of events is accurate.
>
> I hope you find the more complete and accurate description of service helpful. Wishing you the best,
> Brian

Mr. Padis Lied In Effort to Get Delay

Later Mr. Padis admitted that USATXN had records of actual service on 9 Jan

2024 but that it indicated service was by Mr. Carr. His original claim USATXN 'has no record of having been served in this case' was a simple lie. Mr. Carr concluded that Mr. Padis purported 'helpful offer' to resolve a claimed defect was a trick to get Mr. Carr to file a 'Waiver of Service' dated in early March, thereby granting Mr. Padis an extension / delay of almost two months.

Mr. Padis Lies Again in Email Response, Pathological Liar?

On 26 Apr 2024 Mr. Padis wrote (see ECF 30-1 emailThread20240417to20240426.pdf):

> ... Lastly, I believe you found an email I authored to be misleading because **I indicated I believed that service was improper**[2] and offered to accept service on behalf of the U.S. Attorney. As discussed, I was under the impression that you had personally served a copy of the summons and the complaint in violation of FRCP 4(c)(2) (requiring service be made by someone who is "not a party"), and I later learned through our correspondence that you delivered a copy of the summons and the complaint together with a process server - presenting an interesting legal question. Ultimately, the government filed a timely response to the complaint under Rule 12(b) rather than litigate this interesting service issue.
>
> Although my correspondence was not at all misleading, I do want to note that all of these discussions around service occurred over email and not in a pleading.

It was already clear that Mr. Padis had lied in his 1 Mar 2024 claim USATXN 'has no record of having been served in this case' (as a logical fallacy as well as factual affirmations to the contrary). However, it is shocking that on 26 Apr 2024 he

2 Bold added by Mr. Carr

would claim that previously he had said 'I believed that service was improper'. This is another blatant lie as 'no record of having been served in this case' contradicts 'I believed that service was improper … you had personally served a copy of the summons and the complaint in violation of FRCP 4(c)(2)'.

It is inconceivable how Mr. Padis would lie again with such an obvious lie in a government email / record knowing that Mr. Carr had stated his intention to seek sanctions for false and misleading statements (like the original email). It raises the question of whether Mr. Padis is a pathological liar or one of the other similar conditions. Mr. Carr is not a trained professional to make any such diagnosis, but only raises the question for the court's consideration in evaluating Mr. Padis' numerous statements which Mr. Carr describes as false or misleading statements.

Both Services on USATXN Were Completely Proper

As cited above on 26 Apr 2024 Mr. Padis stated:

> I later learned through our correspondence that you delivered a copy of the summons and the complaint together with a process server - presenting an interesting legal question. Ultimately, the government filed a timely response to the complaint under Rule 12(b) rather than litigate this interesting service issue.

There is no interesting service issue (another false or misleading statement). The affirmation of Mr. Joubert in ECF 10 (service.pdf) was provided to Mr. Padis which demonstrates that Mr. Joubert is over 18 years old and not a party to this action. Any additional requirements which Mr. Padis imagines are not founded in statutes, case law, or good sense.

To explain fully, Mr. Joubert is a casual friend who Mr. Carr met in a local park when they were playing a phone game, Pokemon Go. At one point Mr. Joubert asked Mr. Carr and another Pokemon Go player (semi-retired) to meet him at a certain time and place to witness his signature on some personal real estate papers. At that time Mr. Carr became aware that Mr. Joubert was a licensed certified Notary Public and competent in his profession notarizing real estate papers at closings. Mr. Joubert offered to pay the witnesses the normal rate for such services but we each declined as our financial condition were more comfortable than his and Mr. Joubert was actively pursuing improving his financial circumstances. Friends can help friends out as appropriate.

It also happens that Mr. Joubert is a young black man and welcomes additional work. As such Mr. Carr asked Mr. Joubert to Notarize the signatures from a 501c(3) religious organization member meeting to amend the Certificate or Incorporation. At that time Mr. Carr confirmed the Mr. Joubert was thoroughly competent in his profession and quite reliable and paid Mr. Joubert the normal rate for such services.

In early January of this year when Mr. Carr needed to arrange service of the papers in this matter, Mr. Carr was quite familiar with the requirements of FRCP 4 having arranged service in previous matters, sometimes with professional process servers and sometimes with creative solutions relying on people without previous experience serving such papers (but all were over 18 years of age and not a party to the matter, of course). On that basis, Mr. Carr engaged Mr. Joubert to serve the appropriate papers in a completely legitimate and proper business transaction.

When Mr. Carr and Mr. Joubert arrived at USATXN's address / suite, they asked to speak with the U.S. Attorney. They understood that it was most unlikely that the U.S. Attorney would be available (certainly less than 1% chance, but someone wins the lottery on a regular basis). When the receptionist informed them that the U.S. Attorney was not available, they asked to be directed to the clerk's office or mailroom where such papers are accepted. At that point the receptionist contacted Mr. Barr and the remaining details of the service are available in ECF 28-1 cited above.

Mr. Padis Claims of Legal Questions Concerning Service are False

Mr. Padis' claim that Mr. Carr's presence when service was completed somehow tainted the service is completely unfounded by the statute itself and any associated case law. Indeed Miedreich v. Lauenstein, 232 U.S. 236 (1914) states:

> In the absence of fraud or collusion, where the original party did all that the law required in the issue and attempt to serve process, but the sheriff made a false return to the effect that service had been made, the ... court, in the absence of direct attack upon the return, in acting thereon as though it were true and holding that the sole remedy was an action against the sheriff for a false return, did not deny the party due process of law

which clearly states that once the Plaintiff has complied with the requirements of FRCP 42 (no fraud or collusion of the part of the Plaintiff) then the court is not violating Due Process when it issues a Default Judgment based on the Proof of Service (FRCP 42). To restate, once the Plaintiff has submitted facially correct

Proof of Service it is then incumbent on the Defendant to prove any failures in adequate and timely notice.

Mr. Padis' claims that there are interesting legal questions concerning service are unfounded, misleading, and false. Indeed, it can be argued that having the affirmations of an Officer of the United States (i.e. Mr. Carr, see ECF 30-5, USCISrepG28bc.pdf) to confirm the details of service would only strengthen the courts reliance on the Proof of Service.

These claims are apparent efforts to obscure and confuse issues which are otherwise clear, e.g. that Mr. Padis was investigating options to trick the Plaintiffs into accepting an unwarranted delay of almost two months.

Mr. Padis was Seeking an Unwarranted Delay of Almost Two Months

In Mr. Padis' email of 1 Mar 2024 (cited above and in ECF) Mr. Padis stated that USATXN 'has no record of having been served in this case' but 'If you reply with a summons and a copy of the complaint, I will email you a letter confirming that I am accepting service'.

Mr. Padis is pretending that he does not already have access to the Complaint and Summons and offering to provide a waiver of service if Plaintiffs provide those documents. Of course we know that Mr. Padis already had access to those documents, so why wouldn't he say so?

Well, if Mr. Padis was trying to create a delay and he said in a government email

that he had the complaint and summons, then all service issues would be resolved. Having admitted in a government email that he had the required documents, he would have proved that the Defendants had adequate notice under Due Process (the real underlying issue). The only question would be when there was adequate notice and the 9 Jan 2024 or even 12 Jan 2024 dates are likely candidates.

However, by lying (no record of service) and pretending he didn't have a copy of the documents, he might be able to trick the Plaintiffs into submitting a 'letter confirming that I [Mr. Padis] am accepting service' dated in early March (with a huge delay in USATXN's response date).

If Mr. Padis had truly wanted to correct the error in the record (as implied that he was doing a favor for the Plaintiffs), he could have simply appeared in the matter and posted a 'waiver of service' dated 9 Jan 2024. No need to have the Plaintiffs send him documents he already had or receive and file the letter. Even simpler, Mr. Padis could have submitted a timely response making the issue of Proof of Service moot.

While Mr. Padis' attempted ruse to delay the matter failed, he wasted the Plaintiff's time through the several documents Mr. Carr retrieved and attached to the email as well as sharing all the other documents in the edocket folder (it is likely the link still works though such sharing is fragile).

Relief Sought By Plaintiffs

While the court has complete discretion in appropriate sanctions, Mr. Carr suggests

that the first email exchange and false statement be sanctioned with 2 hours of community service and one day of early filing. Mr. Carr has spent significantly greater effort responding to the lies in the second email exchange and suggests 8 hours of community service and 2 days of early filing.

The total relief sought for the email exchanges is 10 hours of community service and 3 days of early filing. In addition, this affirmation demonstrates Mr. Padis' intention to delay without any effort to resolve issues or provide relief for the Plaintiff's denied freedom to travel, work, vote, or help their son's employment prospects. This 'intent to delay' should be considered when evaluating Mr. Padis' pleadings which will be separately submitted for sanctions.

Mr. Carr hereby affirms under penalty of perjury in both the United States and Thailand that as an individual:

> I have reviewed the above affirmation and believe all of the statements to be true to the best of my knowledge.

I hereby reaffirm that the above is true to the best of my knowledge under penalty of perjury in both the United States and Thailand.

/s Brian P. Carr

_____

Brian P. Carr
1201 Brady Dr

Irving, TX 75061

Date: 8 May 2024

Location: Irving, Texas

Notice of Entry of Appearance as Attorney or Accredited Representative

Department of Homeland Security

DHS
Form G-28
OMB No. 1615-0105
Expires 05/31/2021

Part 1. Information About Attorney or Accredited Representative

1. USCIS Online Account Number (if any)
▶

Name of Attorney or Accredited Representative

2.a. Family Name (Last Name): Carr
2.b. Given Name (First Name): Brian
2.c. Middle Name: P

Address of Attorney or Accredited Representative

3.a. Street Number and Name: 1201 Brady Dr
3.b. ☐ Apt. ☐ Ste. ☐ Flr.
3.c. City or Town: Irving
3.d. State: TX
3.e. ZIP Code (*USPS ZIP Code Lookup*): 75061
3.f. Province
3.g. Postal Code
3.h. Country

Contact Information of Attorney or Accredited Representative

4. Daytime Telephone Number: 518-227-0129
5. Mobile Telephone Number (if any): 972-504-0679
6. Email Address (if any): carrbp@gmail.com
7. Fax Number (if any)

Part 2. Eligibility Information for Attorney or Accredited Representative

Select **all applicable** items.

1.a. ☐ I am an attorney eligible to practice law in, and a member in good standing of, the bar of the highest courts of the following states, possessions, territories, commonwealths, or the District of Columbia. If you need extra space to complete this section, use the space provided in **Part 6. Additional Information**.

Licensing Authority

1.b. Bar Number (if applicable)

1.c. I (select **only one** box) ☒ am not ☐ am subject to any order suspending, enjoining, restraining, disbarring, or otherwise restricting me in the practice of law. If you are subject to any orders, use the space provided in **Part 6. Additional Information** to provide an explanation.

1.d. Name of Law Firm or Organization (if applicable)

2.a. ☐ I am an accredited representative of the following qualified nonprofit religious, charitable, social service, or similar organization established in the United States and recognized by the Department of Justice in accordance with 8 CFR part 1292.

2.b. Name of Recognized Organization

2.c. Date of Accreditation (mm/dd/yyyy)

3. ☐ I am associated with _____, the attorney or accredited representative of record who previously filed Form G-28 in this case, and my appearance as an attorney or accredited representative for a limited purpose is at his or her request.

4.a. ☐ I am a law student or law graduate working under the direct supervision of the attorney or accredited representative of record on this form in accordance with the requirements in 8 CFR 292.1(a)(2).

4.b. Name of Law Student or Law Graduate

Part 3. Notice of Appearance as Attorney or Accredited Representative

If you need extra space to complete this section, use the space provided in **Part 6. Additional Information**.

This appearance relates to immigration matters before (select **only one** box):

1.a. ☒ U.S. Citizenship and Immigration Services (USCIS)

1.b. List the form numbers or specific matter in which appearance is entered.

I-751 and N-400

2.a. ☐ U.S. Immigration and Customs Enforcement (ICE)

2.b. List the specific matter in which appearance is entered.

3.a. ☐ U.S. Customs and Border Protection (CBP)

3.b. List the specific matter in which appearance is entered.

4. Receipt Number (if any)

► MSC2091582908 and IOE9752855294

5. I enter my appearance as an attorney or accredited representative at the request of the (select **only one** box):

☒ Applicant ☐ Petitioner ☐ Requestor

☐ Beneficiary/Derivative ☐ Respondent (ICE, CBP)

Information About Client (Applicant, Petitioner, Requestor, Beneficiary or Derivative, Respondent, or Authorized Signatory for an Entity)

6.a. Family Name (Last Name) Carr

6.b. Given Name (First Name) Rueangrong

6.c. Middle Name

7.a. Name of Entity (if applicable)

7.b. Title of Authorized Signatory for Entity (if applicable)

8. Client's USCIS Online Account Number (if any)

►

9. Client's Alien Registration Number (A-Number) (if any)

► **A-** 056137568

Client's Contact Information

10. Daytime Telephone Number

972-504-0655

11. Mobile Telephone Number (if any)

972-504-0655

12. Email Address (if any)

airpk1961@gmail.com

Mailing Address of Client

NOTE: Provide the client's mailing address. **Do not** provide the business mailing address of the attorney or accredited representative **unless** it serves as the safe mailing address on the application or petition being filed with this Form G-28.

13.a. Street Number and Name 1201 Brady Dr

13.b. ☐ Apt. ☐ Ste. ☐ Flr.

13.c. City or Town Irving

13.d. State TX **13.e.** ZIP Code Irving

13.f. Province

13.g. Postal Code

13.h. Country

Part 4. Client's Consent to Representation and Signature

Consent to Representation and Release of Information

I have requested the representation of and consented to being represented by the attorney or accredited representative named in **Part 1.** of this form. According to the Privacy Act of 1974 and U.S. Department of Homeland Security (DHS) policy, I also consent to the disclosure to the named attorney or accredited representative of any records pertaining to me that appear in any system of records of USCIS, ICE, or CBP.

Part 4. Client's Consent to Representation and Signature (continued)

Options Regarding Receipt of USCIS Notices and Documents

USCIS will send notices to both a represented party (the client) and his, her, or its attorney or accredited representative either through mail or electronic delivery. USCIS will send all secure identity documents and Travel Documents to the client's U.S. mailing address.

If you want to have notices and/or secure identity documents sent to your attorney or accredited representative of record rather than to you, please select **all applicable** items below. You may change these elections through written notice to USCIS.

1.a. ☐ I request that USCIS send original notices on an application or petition to the business address of my attorney or accredited representative as listed in this form.

1.b. ☐ I request that USCIS send any secure identity document (Permanent Resident Card, Employment Authorization Document, or Travel Document) that I receive to the U.S. business address of my attorney or accredited representative (or to a designated military or diplomatic address in a foreign country (if permitted)).

NOTE: If your notice contains Form I-94, Arrival-Departure Record, USCIS will send the notice to the U.S. business address of your attorney or accredited representative. If you would rather have your Form I-94 sent directly to you, select **Item Number 1.c.**

1.c. ☐ I request that USCIS send my notice containing Form I-94 to me at my U.S. mailing address.

Signature of Client or Authorized Signatory for an Entity

2.a. Signature of Client or Authorized Signatory for an Entity

➡ AIR CAV

2.b. Date of Signature (mm/dd/yyyy) 21 Sep 2023

Part 5. Signature of Attorney or Accredited Representative

I have read and understand the regulations and conditions contained in 8 CFR 103.2 and 292 governing appearances and representation before DHS. I declare under penalty of perjury under the laws of the United States that the information I have provided on this form is true and correct.

1. a. Signature of Attorney or Accredited Representative

Brian P. Cary

1.b. Date of Signature (mm/dd/yyyy) 21 Sep 2023

2.a. Signature of Law Student or Law Graduate

2.b. Date of Signature (mm/dd/yyyy)

Part 6. Additional Information

If you need extra space to provide any additional information within this form, use the space below. If you need more space than what is provided, you may make copies of this page to complete and file with this form or attach a separate sheet of paper. Type or print your name at the top of each sheet; indicate the **Page Number**, **Part Number**, and **Item Number** to which your answer refers; and sign and date each sheet.

1.a Family Name (Last Name): Carr

1.b. Given Name (First Name): Brian

1.c. Middle Name: P

2.a. Page Number: 1 **2.b.** Part Number: 2 **2.c.** Item Number: 1c

2.d. In compliance with 8 CFR Part 1292 - Representation and Appearances, Paragraph 3, Reputable Individuals:

I, Brian P Carr, hereby declare under penalty of perjury that I have a pre-existing relationship with Rueangrong Carr, my wife, and that I am appearing in this matter at the request of my wife and am appearing without direct or indirect renumeration.

I further declare that I am also an officer of the United States as a U.S. Regular Army Captain with an honorable discharge and, as such, have training and experience in judicial matters (initially primarily UCMJ). I also have an understanding of and commitment to supporting the U.S. Constitution through the oath of office to which I am still bound.

3.a. Page Number **3.b.** Part Number **3.c.** Item Number

3.d.

4.a. Page Number **4.b.** Part Number **4.c.** Item Number

4.d.

5.a. Page Number **5.b.** Part Number **5.c.** Item Number

5.d.

6.a. Page Number **6.b.** Part Number **6.c.** Item Number

6.d.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

Brian P. Carr, Rueangrong Carr, and Buakhao Von Kramer Plaintiffs versus United States, US Department of Justice, USPS, USPS OIG, USPS BoG, US CIGIE, Department of State, Department of State OIG, USCIS, DHS OIG, and SSA Defendants	Civil No. 3-23CV2875 - S Affirmation Asserting Citing 'Not Precedent' Cases Prima Facie Grounds for Sanctions

Affirmation Asserting

Citing 'Not Precedent' Cases

Prima Facie Grounds for Sanctions

Mr. Carr has considered why a court would explicitly add the text 'this opinion should not be published and is not precedent'. Indeed there are extensive discussions about the value of citing such cases one of which is linked. While other courts have tried dictating sanctions for citing 'not precedent' cases, the results seem to have been largely ineffective. However, if the sanctions were simplified, creative, and substantially automated perhaps they could result in an effective deterrence. Disbarment for a minor mistake seems inappropriate, but 8 hours of community service might be a much more effective remedy for minor mistakes.

Mr. Carr expects that the normal justification for a 'not precedent' case would be

the facts of the case are so unusual that it is not likely that the conclusions would be applicable to any other case. A clear example of that is Starrett where Starrett claimed the Defendants 'remotely monitored and controlled his thoughts, movements, sleep, and bodily functions'. These extreme and unusual allegations resulted in extreme conclusions such as 'delusional' and 'fantastical'.

For parties who are not trying to resolve pending issues but instead are raising meritless issues to delay or harass these 'not precedent' decisions are highly attractive. They provide extreme conclusions and these vexatious parties don't bother demonstrating that the case is applicable.

Mr. Carr would suggest that citing any case which clearly states it 'is not precedent' indicates de facto improper pleadings and for a first offense the default sanction would be one day of community service and one day of early responses for each case cited in all pleadings which are currently pending when the sanctions are decided.

If there is a repeat offense it would be up to the court to choose sanctions in line with the delay caused by the flawed pleadings (early answers) and damages caused through costs or, if costs are not applicable due to government or pro se parties, then community service with an adjusted number of hours.

As Mr. Padis cites two 'not precedent' cases, Aguilera v. Holder, 354 F. App'x 882, 884 (5th Cir. 2009) and Starrett v. Lockheed Martin Corp. et al., 735 F. Appx 169, 170 (5th Cir. 2018) without providing any foundation for how they are applicable, 16 hours of community service and 2 days of early filings are recommended.

Mr. Carr hereby affirms under penalty of perjury in both the United States and Thailand that as an individual:

> I have reviewed the above affirmation and believe all of the statements to be true to the best of my knowledge.

I hereby reaffirm that the above is true to the best of my knowledge under penalty of perjury in both the United States and Thailand.

/s Brian P. Carr

_____

Brian P. Carr
1201 Brady Dr

Irving, TX 75061

Date: 8 May 2024

Location: Irving, Texas

Brian Carr
1201 Brady Drive
Irving, TX 75061
carrbp@gmail.com
518-227-0129

USCIS

Dear Sirs / Madams, September 26, 2023

The previous request to postpone the interview scheduled for 11 Oct 2023 did not list all the reasons for postponing the interview. As such this document is being submitted to support the request for postponement.

My wife and I have completed all the reservations and paid for all the tickets for our trip to tour Europe and then visit Thailand with us leaving the U.S. on 10 Oct 2023 and returning 25 Dec 2023. The are several purposes of this rather extensive trip. The purposes are:

1) Religious obligations. My wife's son, Earth, will be serving as a Buddhist monk for 30 days toward the end of 2023. This is a significant 'once in lifetime' event for Thai young men. Earth is a sergeant in the Thai Army and will be granted leave in order to fulfill this practice. As Earth's parents we have religious obligations to support this practice.

2) Familial obligations. As discussed above, we have obligations to support our son.

3) Business promotion. During the European part of the trip, we will promote our Schedule C Business, Deep Muscle Tissue Therapy or Traditional Thai Massage.

4) Business Education and Training. My wife was certified for traditional Thai Massage, a recognized form of traditional medical care, at a school in Chiang Rai. My wife will visit the school to renew and update her training.

5) Leisure. We started planning this trip in February 2023 after we received official notice from USCIS that my wife's N-400 had been approved. We had previously decided that we would celebrate her passing the citizenship tests with a tour of Europe.

The following documents are attached:

1) Airline tickets for my wife, her sister, Buakhao,and myself as TktDFW-AMS-BKK-Oct10-Nov9-Dec25rev2309.pdf. Note that these tickets are non-refundable and as such, last minute changes to flights can double the cost of the tickets due to the demand for the limited number of seats available. Depending on the circumstances, changes to the tickets could result in $5,000 additional charges.

2) My wife's Netherlands Schengen (European) visa is attached as RCarrNLDvisa017152184-2023-06-23.pdf. We applied for this visa in early June and while it is valid for multiple entries, if we arrive even a single day later than ticketed the visa will be invalid. The initial use of this visa is only valid for Netherlands centric trips and with the tour we are taking, an Italian visa is required if we arrive later than provided for in the flight tickets. We structured this trip to be Netherlands centric as Italian visas were

exceedingly difficult to get in the U.S.. Buakhao got a similar visa as Italian and Netherlands visas were equally available in Thailand.

3) My wife's tour ticket is attached as rcExpat202314500_E_ticket.pdf. As of the current date, the balance has been fully paid and is not refundable. We have similar tickets for myself and Buakhao.

4) Our room reservations are also required in order to enter the Netherlands and are attached as ibis20231011.pdf and ibis20231108.pdf. Note that these reservations have been paid in full and are non refundable.

5) We are similarly required to have medical insurance for the duration of our European stay. RCinsure691802190216rev2.pdf is my wife's proof of insurance and we have similar policies for myself and Buakhao. The dates match the flight tickets as required.

This trip is complex and of great importance. It is not realistic for us to reschedule our departure as it could be hugely expensive. Further, we began our inquiries as to the required Oath of Allegiance in February 2023. Please see the I-751 final approval which also states that our N-400 has been approved and only the Oath of Allegiance (an administrative function, not really part of the adjudication) remains for full citizenship.

If there was any error in the I-751 approval, USCIS should have sought to correct the error within 30 days (the period where the final decision is appealable). In addition we notified USCIS of our planned trip dates in August (seeking a new A-551 stamp as we will be outside the country when a new stamp would be provided).

Given that USCIS has taken almost eight months to schedule the interview in question and the extensive plans and commitments we have made for our upcoming trip, USCIS must reschedule the interview until after our return on 25 Dec 2023.

Your prompt attention to this matter is greatly appreciated.

Brian P. Carr

Gmail **Brian Carr <carrbp@gmail.com>**

Notice of Intention to Contest Denial of N-400, Fwd: URGENT: Report of Federal Crime in USCIS,, DHS OIG Complaint HLCN1694292030038, Re: CIS Ombudsman Request Number 2022056241

1 message

Brian Carr <carrbp@gmail.com> Tue, Nov 7, 2023 at 2:57 PM
To: criminal.division@usdoj.gov, Joseph Cuffari <joseph.cuffari@oig.dhs.gov>, "Kristen Fredricks, DHS OIG Chief of Staff" <kristen.fredricks@oig.dhs.gov>, Director USCIS Jaddou <Ur.M.Jaddou@uscis.dhs.gov>
Cc: cisombudsman <cisombudsman@hq.dhs.gov>, "Ward, Jennifer" <Jennifer.Ward@mail.house.gov>

Dear Sir / Madam:

I must apologize for the lack care with which this notice was prepared. At this time my wife and I are on a 26 day bus tour visiting 14 countries in Europe. It is most inconvenient to carefully prepare a proper response. However, it is also important that my notice be timely.

My wife's N-400 application for citizenship was denied on 14 October 2023 for failure to appear at an interview. This is a most unjust and egregious violation of due process for the following reasons: there was no evidence of timely notice of the interview and there is compelling evidence that, in fact, the notice was not delivered in a timely fashion. Further, the denial makes no discussion of the several attempts which we made to reschedule the interview because of the substantial financial impact for my wife's attendance at a 11 October 2023 appointment with a ten week international trip with departure previously scheduled for 10 October 2023.

This notice is formally addressed to the attorney general, but it is seeking assistance in promptly correcting this injustice. This notice is also being sent to the director of USCIS as well as the DHS IG. If they are able to assist in this matter it would be greatly appreciated.

It is hard for me to imagine that any DoJ attorney or other parties would want to defend this egregious injustice in court. As such, it is in the best interest of all parties to work for a prompt resolution outside of court.

Sincerely,

Brian P Carr

Overview

This is Notice of Intention to contest the denial of the N-400 application for naturalization of Mrs. Rueangrong Carr (Mrs. Carr) on 13 Oct 2023 for failure to appear at a scheduled interview. The decision itself is seriously flawed in numerous ways and I will elaborate on the failings of United States Citizen and Immigration Services (USCIS) in this matter. However, the primary failings are:The tribunal in this matter did not have jurisdiction to deny the N-400 application. The final finding of facts, decision, and order of USCIS on 31 Jan 2023 for the I-751 application for removal of conditions on permanent resident status (a.k.a. permanent green card) stated the N-400 was approved and only required the administrative 'Oath of Allegiance' for her to receive her Certificate of Naturalization. As there was a prior final decision approving the N-400 application, USCIS can not reopen the matter except by filing with federal district courts.

There was not the required 30 days of notice of the interview.

The tribunal completely ignored the timely and persistent efforts Mrs. Carr had made to reschedule the interview due to the significant financial, personal, and professional impact attendance would entail.

The decision itself relies on several false documents by USCIS (federal crimes of falsification of records) and itself contains criminal violations of 18 U.S. Code Section 1001 (cited below).

The Decision

The Decision from USCIS dated 13 October 2023 attached as USCISdeny20231013.pdf states:On July 11, 2022, you filed a Form N-400, Application for Naturalization, with U.S. Citizenship and Immigration Services (USCIS) under section 319 of the Immigration and Nationality Act (INA). After a thorough review of the information provided in your application for naturalization, the documents supporting your application, and your testimony during your naturalization interview, USCIS has determined that you are not eligible for naturalization. Accordingly, USCIS must deny your application for naturalization. ...

> On November 13, 2018, you obtained conditional permanent resident status through your spouse and your conditions were removed on January 30, 2023. USCIS received your Form N-400 on July 11, 2022, and on January 30, 2023, you appeared for an interview to determine your eligibility for naturalization.
>
> At the beginning of your naturalization interview, an Immigration Services Officer placed you under oath and then administered the naturalization test. At that time you were unable to write a sentence in ordinary usage of the English language, and answer 6 of 10 U.S. Government and history (civics) questions correctly. Since you did not achieve a passing score on the English or civics portions of the naturalization test, on October 11, 2023, you were scheduled for a second interview to retake these portions of the naturalization test. On October 11, 2023, you did not appear as requested. Further, you have not provided USCIS with a good reason for your absence. Your failure to appear at the second interview means you have not passed the English or civics testing requirements for naturalization. As a result, you are ineligible for naturalization since you have not demonstrated your ability to pass the English or civics requirements for naturalization. Therefore, USCIS must deny your application for naturalization. See INA 312 and Title 8, Code of Federal Regulations (8 CFR) section 312.5(a) and (b).
>
> If you believe that you can overcome the grounds for this denial, you may submit a request for a hearing on Form N-336, Request for a Hearing on a Decision in Naturalization Proceedings, within 30 calendar days of service of this decision (33 days if this decision was mailed). See attached 8 CFR 336.2 (a) and 103.8(b). Without a properly filed Form N-336, this decision will become final. See INA 336.

Requirements of due process

USCIS borrows heavily from judicial terminology in describing their processes and procedures creating the semblance of 'due process', the reality is USCIS does not provide any of the elements of due process.

There is an excellent overview of 'due process' in
https://www.law.cornell.edu/wex/procedural_due_process
It lists the ten key elements required for due process as:
1. An unbiased tribunal.
2. Notice of the proposed action and the grounds asserted for it.
3. Opportunity to present reasons why the proposed action should not be taken.
4. The right to present evidence, including the right to call witnesses.
5. The right to know opposing evidence.
6. The right to cross-examine adverse witnesses.
7. A decision based exclusively on the evidence presented.
8. Opportunity to be represented by counsel.
9. Requirement that the tribunal prepare a record of the evidence presented.
10. Requirement that the tribunal prepare written findings of fact and reasons for its decision

These elements are derived from Judge Henry Friendly's article titled "Some Kind of Hearing" which can be found at:
https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=5317&context=penn_law_review
A careful review of the case history and decision calls into question whether USCIS policies and procedures support any of the elements of due process. The essence of Due Process is that there must be a fair hearing before decisions are reached and nothing about USCIS hearings are fair, providing applicants with an opportunity to be heard.

Case History

On 04 Aug 2020, USCIS received Mrs. Carr's I-751 application for a permanent green card (remove two year conditions) with receipt MSC2091582908. However, there was no interview with Mrs. Carr receiving an 18 month extension letter and later a 24 month extension letter (thus extending the original expiration of her 'green card' from 13 Nov 2020 to 13 Nov 2022).

On July 11, 2022, Mrs. Carr submitted her N-400 application for naturalization as USCIS timetables suggested her I-751 interview was imminent and there was a 9 month delay for N-400 interviews. This would allow her to complete

her I-751 interview and get her permanent green card about six months before her N-400 interview. This would allow time for her to study for the English and civics exams without concerns about having an expired green card.

Mrs. Carr's emphatic desire for a permanent green card before citizenship

It is important to understand that Mrs. Carr was absolutely terrified of USCIS. As an older immigrant from a poor family with extremely limited education, only 4 years of schooling, and no formal exposure to English in her childhood, Mrs. Carr feared arbitrary, capricious and unjust actions by USCIS such as deporting her without cause or notice if she failed her citizenship test or leaving her stranded overseas, not able to return to the U.S..

Mr. Carr also came from a poor family, but he was born in the U.S. and was very fortunate. Mr. Carr graduated from West Point and later received a graduate degree from M.I.T.. Mr. Carr could not believe that USCIS would take unlawful and illegal actions such as leaving Mrs. Carr stranded overseas unable to return to the U.S..

It turns out in retrospect that Mrs. Carr was more correct than Mr. Carr.

Unlawful Restrictions on Travel by USCIS, Stranded in Thailand

In September of 2022, Mrs. Carr returned to Thailand on an emergency basis as her mother's health was failing. Sadly Mrs. Carr arrived just after her mother's death but was able to participate in the funeral ceremonies which extended until December of 2022 as Thai traditions has the ashes from the cremation waiting 100 days before being taken back by the family.

Her green card and extensions expired on 13 Nov 2023 while Mrs. Carr was in Thailand on an emergency basis. Even though 8 CFR Section 216.4 states ... 'Upon receipt of a properly filed Form I-751, the alien's conditional permanent resident status shall be extended automatically, if necessary, until such time as the director [of USCIS] has adjudicated the petition.', USCIS refused to provide Mrs. Carr with any documentation to allow her return to the United States. This is contrary to the above statute.

USCIS suggestion for how Mrs. Carr was to return to the US via an I-131A (for travelers who have 'lost' their documents to get a one time document allowing their return for a $575 fee). Instead Mrs. Carr got a $160 multiple entry B1 / B2, business / tourist visa and was able to return to the USA in late Dec 2022.

Rescheduling Original Interview

Further, Mrs. Carr original N-400 interview was scheduled for 14 Dec 2022. Mr. Brian P Carr (Mr. Carr) explained to USCIS that Mrs. Carr would be unable to attend as she was out of country and could not return due to USCIS's refusal to provide her with proof of valid permanent resident status. On 21 Nov 2022 USCIS cancelled the 14 Dec 2022 interview and later scheduled her joint interview for I-751 and N-400 for 30 Jan 2023.

A-551 Passport Stamp Instead of Green Card

Mrs. Carr was also able to come into a USCIS office on 3 Jan 2023 to get an A-551 stamp in her passport which was valid for one year but does not provide the full ability to travel and work freely of a traditional green card.

Improper Application of English Requirement to Older and Poor, Discriminates Against Buddhist and Islamic Cultures

Prior to the interview on 30 January 2032, Mr Carr initiated a complaint with the IG that the English requirements for naturalization were discriminatory based on religion, income, age and culture.

It is well established that the appropriate time to learn the sounds of English is soon after birth. Further the appropriate time to learn to recognize the shapes of English characters is before adolescence.

For example, in Thai language there is no 'th' sound. In contrast, the pair of plosive sounds d and t are not in the Thai language. The Thai language includes only the consonant that is between d and t. As an adult Mr Carr cannot hear the sound that is between d and t nor can he pronounce it. Similarly, because Mrs. Carr was not exposed to English at an early age, she is unable to hear or pronounce the 'th' sound.

Similarly, the time to learn to recognize the characters of the English alphabet is before adolescence. While it is possible to learn to recognize a foreign alphabet at later years, the recognition will never be as quick, accurate or comfortable as if it was learned before adolescence.

The actual effect of the English requirement for citizenship is to discriminate against older individuals from poor families from Buddhist and Islamic countries.

Joint I-751 and N-400 Interview of 30 Jan 2023

There was a joint I-751 and N-400 application on 30 Jan 2023. The informal results were that Mrs. Carr failed the English and civics tests. The interviewer also cancelled the 'final' portion of the I-751 interview which was an undocumented and possibly unlawful review of the 'criminal background' questions from some previous forms (not part of the I-751 application itself) as Mrs. Carr did not understand English and so could not personally answer those questions.

The results of the interview were given verbally and informally at the time of the interview. There was also a poorly written and ambiguous form letter with check boxes concerning the N-400 results.

However, the next day (31 Jan 2023) USCIS entered a formal written decision for the I-751 application which is attached as I797forMSC2091582908-ioe9752855294.pdf. For your convenience, the text of the response is:

> We have approved your I-751, Petition to Remove Conditions on Residence. Our records also indicate we have approved your Form N-400 Application for Naturalization. Because we also approved your N-400, you will not receive a new Permanent Resident Card (also known as a Green Card). Instead, once you have taken the Oath of Allegiance, you will receive a Certificate of Naturalization, which will be proof of your U.S. citizenship. If you have questions regarding this process, please contact the USCIS contact center at 800-375-5283.

Mr. and Mrs. Carr were elated at this change in fortune as it was a complete reversal of the informal verbal results. They relied on the formal written decision as a final findings of facts, decision, and order (to borrow from judicial terminology which is appropriate for a serious due process matter concerning the ability to vote and work and travel freely).

USCIS Denies I-751 Through False Statements

Within a couple of weeks they inquired at the specified contact number as to when the Oath of Allegiance would be scheduled and were told that the normal processing time for such matters was 4 or 5 months and that they should call back after that.

Mr. and Mrs. Carr would later learn that her I-751 was actually denied (no green card would ever be issued on that application based on the statement that Mrs. Carr's N-400 was approved). As more than thirty days have passed since this effective denial based on statements which USCIS believed to be false, there are no avenues within USCIS to actually get the permanent green card.

USCIS Unlawful Policies Justified as 'Enforcement'

The US government has had a long history of discriminating against foreign nationals with USCIS and it's counterpart for visas in the Department of State each contributing through an unlawful disregard for due process.

However, during the Trump era with the appointment of Director Francis Cissna, confirmed 5 Oct 2017, USCIS went to new heights of illegally mistreating foreign nationals.

Specifically, the option of waiving the interview for an I-751 application was eliminated (previously about 90% had been waived) thus creating an untenable burden for USCIS which already had a 1-year backlog of applications. Further, the interviewer was now required to verbally confirm the prior criminal background questions.

As most I-751 applicants do not speak English and most USCIS interviewers speak only English, USCIS effectively stopped conducting interviews for I-751 applications.

Instead USCIS simply waited until the applicant later filed an N-400 application for citizenship, though not all applicants later filed N-400 applications. Then the interviews were combined with the verbal review of the criminal background questions conducted in English, assuming the applicant was able to pass the English test. Further, the criminal background questions were already part of the N-400 interview in any case.

However, if the applicant was unable to pass the English test, then USCIS was in a bind for the I-751 and had to find a

creative solution to process this case.

It appears that USCIS chose to effectively deny the I-751 application by claiming it was approved along with the N-400 so that no permanent resident card was provided. However, USCIS would then refuse to provide either a permanent resident card or certificate of naturalization by later claiming in future filings that the N-400 application had not been approved.

This meets the criteria of a federal crime because the effective denial of the I-751 application was based on a claim that USCIS believed was false. For future reference, this will be called 'effective denial based on false premises'.

USCIS Provides Incomplete or False Estimates of Interview Dates

When USCIS effectively ceased providing separate I-751 interviews, they did not provide notice to applicants nor did they provide accurate estimates for the dates when interviews would be scheduled.

This caused great uncertainty and fear for those applicants who were poorly educated with limited English ability and poor understanding of US government procedures such as Mrs. Carr.

The phone number provided by USCIS for questions and concerns was answered by an automated phone system which was distinctly unresponsive and would routinely hang up on applicants if they were not able to correctly formulate a request or question which the automated could respond to. Through most of the time when the I-751 application was pending scheduling an interview, there were no requests or questions which the automated system could respond to so that the applicant was sure to be hung up on by the automated system after about five minutes of struggling to find a way to speak to an actual person where they could explain their concern. This phone number was the only point of contact for applicants attempting to get information about the status of their application.

Criminal Background Questions Unlawful

Just after the interview of 30 January 2023, Mr Carr also initiated an IG complaint concerning the criminal background questions which were routinely included as part of the USCIS application policy.

In particular, there are no exceptions provided about classified information which cannot be released to the interviewer or records sealed by a lawful court order.

Further it is overly broad to not restrict the questions to actual convictions for serious crimes. As stated the questions would include every minor traffic or even parking violation in the state of Texas where such violations are considered crimes. The truth is, no one remembers all the situations where they may have gone over the speed limit or parked a few inches too close or too far from the curb.

In truth, the only acceptable answer to any of the criminal background questions is 'yes' with an explanation of 'I can neither affirm nor deny the existence information relating to this question.'

USCIS Informed of Upcoming Travel Plans

In August Mr. and Mrs. Carr contacted USCIS about scheduling a new A-551 stamp for Mrs. Carr's passport to preserve her limited to ability to work and travel based on their travel plans to be out of the country from 10 Oct 2023 to 25 Dec 2023. They were told that they could not get a replacement A-551 stamp as they can only be issued within 30 days of expiration and the applicant must be in the US to get the stamp.

In August Mr. Carr also contacted his congressman, Representative Veasey, seeking assistance in getting the Oath of Allegiance scheduled as no action had been taken in the matter.

N-400 Interview of 30 Jan 2023 Cancelled

However, on 01 Sep 2023 USCIS sent notice attached as USCIScancel20230901-20230130.pdf which states that the interview of 30 Jan 2023 was cancelled due to 'unforeseen' circumstances (sent under the N-400 receipt). Of course this is a completely false document (and hence a federal crime) as the N-400 interview was completed and this document contradicts several previous documents and verbal statements as well as the final decision in the I-751 case.

On 5 Sep 2023 Mr. Carr and Mrs. Carr called USCIS at the proscribed number and spoke with Destiny, ID G010590

They asked that Destiny send an email to the appropriate party to promptly schedule Mrs. Carr's Oath of Allegiance as stated in the cited I-751 approval notice and, in the alternative, if an N-400 was not actually approved, that Mrs. Carr be sent a new 10 year Permanent Resident Card.

Destiny explained that it is not uncommon for additional interviews to be required even after the I-751 and N-400 are approved and that Mrs. Carr could not be sent the approved Permanent Resident card. Implicitly her statement indicates that such formal approvals were actually effective denials based on false premises.

At that time Mr. Carr asked that Destiny take notes for details to include in the email she would send on their behalf.

Mr. Carr cited 18 U.S. Code Section 1001 which is one of many criminal codes for falsification of government records and states in part:

(a) ... whoever, in any matter within the jurisdiction of the executive... branch of the Government of the United States, knowingly and willfully --
(1) falsifies, conceals, or covers up ... a material fact; ... or
(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
shall be fined under this title, imprisoned not more than 5 years

(3) prohibits taking any action based on a false document with the implicit exceptions that actions may be taken to: correct the false document or, if the individual is not authorized to correct the false document, to report the false document to their supervisor and / or the relevant OIG explaining that it there is an existing false document and a possible federal crime when the document was created.

N-400 Interview Scheduled for 11 Oct 2023, Insufficient Notice

On 06 Sep 2023 an interview was scheduled for 11 Oct 2023 as shown in UscisI797intrvw20231011.pdf, but the actual notice was not received until 15 Sep 2023 when it as too late to respond until the next week as Mrs. Carr works Tuesday to Sunday and is not able to respond while she is working.

The arrival date of this notice is a critical issue as there must have been timely notice of the interview in order to justify the denial of the N-400 application for failure to appear. Attached as USCISuspsMailArrivals20230915.pdf is an email from USPS which shows the mail which arrived at their address on 15 Sep 2023. The notice of 06 Sep 2023 seems to have been mailed on 12 Sep 2023 according to the postmark shown in the USPS email. As 30 days notice is required for such interviews, the notice on 15 Sep 2023 was not timely for an 11 Oct 2023 interview and the denial of the N-400 application for failure to appear must be overturned due to lack of notice.

In the contested decision there is no claim of any notice at all and it appears that USCIS routinely delays mailing critical documents a few days after the date of the 'notice'. In cases of mailed documents they adjust the 30 days to 33 days to allow for time in the mail, but there is no adjustment for delay in printing and actually mailing the notice. Given that this document took 9 days to arrive, a more realistic adjustment for mailing would be 44 days if mailed without the normal proof of mailing.

Complaint of Falsified Records, 01 Sep 2023 Cancellation

On 10 Sep 2023, Mr. Carr contacted the USCIS director and DHS IG reporting the contradictory records (was the interview held on 30 Jan 2023 and approving the I-751 and N-400 or was it cancelled with no results). With contradictory records, one or more of them must be false, the foundation of the federal crime of falsification of government records. Mr. Carr also asked for acknowledgment of the report within 7 days. No such acknowledgment has been received to date. On 07 Oct 2023, Mr. Carr asked that DoJ assist in correcting these serious defects in USCIS and DHS IG. (Note: Mr. Carr was unaware of the scheduling of the interview for 11 Oct 2021 on 06 Sep 2023 when he first reported the crime). The reports of the crime and request for assistance are forwarded at the end of this mail.

On 12 Sep 2023 Mr. and Mrs. Carr called USCIS at the proscribed number and spoke with Umika, ID G20028112.

They complained of the of 1 Sep 2023 I-797 Notice of the cancelling of the 30 Jan 2023 N-400 interview due to unforeseen circumstances (described and attached above). They explained that the interview was held on that date and the 01 Sep 2023 document is a false record (and federal crime) which also contradicts the I-751 final decision of 31 Jan 2023 which stated that the N-400 application was approved

at that interview. They advised Umika that she must either correct the false record or, if she did not have the authority to correct the record, she must contact either her supervisor or the IG or both to report the crime. Failure to do so on her part would itself be a crime under 18 U.S. Code Section 1001, part 3, which Mr. Carr read to her after asking her to take notes.

Mr. and Mrs. Carr also asked that Mrs. Carr immediately be sent the new 48 month extension letter which was publicly authorized by USCIS on 23 Jan 2023, one week before the interview (so USCIS was required to have mailed her a copy of the extension letter before the interview). The USCIS announcement was also about two months after they had complained to USCIS and the DHS OIG that USCIS had unlawfully left Mrs. Carr stranded in Thailand due to the absence of such a 48 month extension letter.

They also asked that USCIS send Mrs. Carr a permanent green card as soon as possible as there was now a record in the N-400 case indicating that her N-400 application had not been approved and so there was no basis for withholding the approved green card.

They also asked that local representative contact the USCIS director in order to get copies of the emails which properly explained their complaints to date as that was the only method of sending written documents to USCIS for their consideration.

They also asked that the local representative call them back on Monday 18 Sep 2023 at 9AM as Mrs. Carr would be working during normal business hours on Tuesday through Sunday and unable to take calls. No such call back was made. (Note: At this time, Mr. Carr was unaware of the scheduling of the interview for 11 Oct 2021 on 06 Sep 2023 and did not receive notice until 15 Sep 2023.)

First Request to Reschedule Interview

On 19 Sep 2023, Mr. and Mrs. Carr called USCIS at the proscribed number and spoke with David, ID G009845. (Note: this request was timely as Mr. Carr only learned of the scheduled interview date on 15 Sep 2023)

They requested that the interview scheduled for 11 Oct 2023 be rescheduled as they had prior plans to be out of the country from 10 Oct 2023 to 25 Dec 2023. Mrs. Carr asked if the interview could be scheduled for only a day or two earlier but they were told that it could not be scheduled earlier.

Their request to reschedule the interview was assigned ID T1B2622391513DAL.

Upon a lengthy description of the purpose of the ten week trip, David incorrectly summarized the reason for the trip as 'leisure' which raised concerns for Mr. Carr that their trip was not being given appropriate gravity. They asked that David request that USCIS reschedule for after the completion of their trip on 25 Dec 2023. It turned out that David was restricted to 80 characters in his request and so described the reason for rescheduling as Mrs. Carr being out of country from 10 Oct 2023 to 25 Dec 2023 to increase the likelihood that the individual who responded would be aware of the duration of their trip.

They also asked that Mrs. Carr be provided with a 12 month extension letter as her A-551 stamp would expire on 03 Jan 2023 and if there were health or other problems which delayed their return, she would no longer have proof that she was authorized to work and travel freely. David assigned sn 30214416 to a request that a local USCIS representative call Mrs. Carr from 2028382104 to discuss the extension letter.

Unsuccessful Call Back on 21 Sep 2023

The call back by the local USCIS representative was made on 21 Sep 2023 in the morning. Mrs. Carr was not home (as she was working) but it was rescheduled for later that evening at 7:30PM when Mrs. Carr was likely to be home. Mr. Carr called Mrs. Carr and she came home a little early and was home by 7PM but the USCIS representative did not return the call as agreed upon.

Request that Mr. Carr be Mrs. Carr's Authorized Representative

Due to the confusion of not being able to get any response from USCIS, on 25 Sep 2023, Mr. and Mrs. Carr called USCIS at the proscribed number and spoke with Martha, ID G029811.

They asked about how to submit a G-28 appointment of Mr. Carr as the representative in this matter. They were told to mail the application to:

ATTN: N-400, G28 submission
850 NW Chipman Rd, Suite 5000
Lees Summit, MO 64063

An online G-28 request had been submitted on 24 Sep 2023 and the hard copy request was mailed on 26 Sep 2023. Martha also explained how to submit a document directly to USCIS on their web site and an electronic copy of the G-28 was submitted on 28 Sep 2023. Martha also explained that USCIS responds to G-28 requests within 30 days. No response has been received to date on this G-28 request.

Denial of Reschedule Request, Not Sent to Authorized Email

While speaking with Martha on 25 Sep 2023, Mr. and Mrs. Carr also learned that on 19 Sep 2023, USCIS had denied their request to reschedule the interview and sent an email to airpk1961@gmail.com, an email address that is rarely monitored.

This was not proper. Before they were married Mrs. Carr had used that email and Mr. Carr had used carrbp@gmail.com. However, since their marriage they have shared their emails with both parties having full access to both email addresses. As they have a legal union, they are not required to maintain separate personal email addresses and now reference all emails to carrbp@gmail.com which is regularly monitored. In rare cases when businesses insist on separate email addresses for separate persons, they provide Mrs. Carr's old email address, but that address is not regularly monitored. At no time have they agreed that USCIS should direct email notices to Mrs. Carr's old email address and none of the submissions to USCIS have authorized the use of that email address. The actual email from USCIS is attached as USCISnotReschedule20230919.pdf.

New request to Reschedule Interview

Due to the delay in their receipt of the denial of their request to reschedule the interview (sent on 19 Sep 2023, found on 25 Sep 2023), Mr. Carr uploaded a timely explanation of the reasons for rescheduling the interview on 27 Sep 2023 which is attached as PostponeIntervieUntilAfter25Dec2023.pdf along with copies of the flight tickets, date restricted European visas, hotel reservations, required medical insurance coverage and European bus tour tickets, all of which are non-refundable. The document explains that the purpose of the trip is religious obligations, family obligations, business promotion, business training and education, and leisure. Planning for the trip was started in Feb 2023 and the leisure portion of the trip was to celebrate the approval of Mrs. Carr's N-400 application for naturalization as USCIS stated in I797forMSC2091582908-ioe9752855294.pdf on 31 Jan 2023.

On 2 Oct 2023, Mr. and Mrs. Carr called USCIS at the proscribed number and spoke with Crystal, ID G027432.

Mr. and Mrs. Carr asked that Crystal submit a new request to reschedule the interview based on the documents submitted on 27 Sep 2023. Crystal explained that they could not make a new request to reschedule of the interview until 15 days after the previous denial on 19 Sep 2023, i.e. 04 Oct 2023 (after the start of Mrs. Carr work week).

They noted that they had provided additional justification for rescheduling the interview which has been uploaded for USCIS to consider.

They asked that USCIS review uploaded G-28, separately filed online and sent via mail and submitted electronically 28 Sep 2023. Crystal explained that USCIS has 30 days to act on G-28 requests.

On 10 Oct 2023, Mr. and Mrs. Carr called USCIS at the proscribed number and spoke with Antoinette, ID G0023588.

Mr. and Mrs. Carr asked that Antoinette submit a new request to reschedule the interview explaining that it was more than 15 days after the previous denial of the request to reschedule and explained that they had submitted additional documentation.

Antoinette contradicted the previous representative, Crystal, and stated that new requests to reschedule can only be made more than 30 days after a previous denial. As interviews are scheduled with the nominal 30 days notice (33 days if notice is by mailing), this would insure that USCIS never reconsiders any denial of rescheduling no matter what the extenuating circumstances. As this claim also contradicts the previous representative it is likely that Antoinette's and possibly Crystal's claims are false and, hence, federal crimes.

Access to Case Records Unlawfully Denied

On 01 Sep 2023, Mr. Carr submitted a request for the entire record in the I-751 and N-400 cases via an online submission of a G-639 FOIA request. Mr. Carr asked for every email, message, or other records which reference the two receipts in this matter (MSC2091582908 and IOE9752855294) including both audio and video recordings. The request was assigned request ID NRC2023277190 and the response was made on 05 Oct 2023. However, the response was only 32 pages and was only the original I-751 and N-400 applications. On 31 Oct 2023 a new FOIA request was submitted via email a copy of which is attached as USCISfoiRqst.pdf. Note that this is a violation of the applicant's due process right to have access to the evidence against the applicant. Mr. Carr had requested access to every record which the tribunal relied on to deny the N-400 application, but was denied access to all such records. It is also possible that the claim that there were only two responsive documents was a federal crime of falsifying government records as it is clear that more records were requested and there was no justification for withholding the other documents.

USCIS Refuses to Provide New Green Card

On 19 Oct 2023, Mr. and Mrs. Carr called USCIS at the proscribed number and requested that Mrs. Carr be sent a new Green Card as her I-751 was approved on 31 Jan 2023 but the Green Card was withheld as her N-400 was also approved and her Certificate of Naturalization was imminent. However, the purported Decision of 14 Oct 2023 clearly indicates that USCIS does not intend to provide Mrs. Carr with promised Certificate of Naturalization in the foreseeable future.

This request resulted in a referral of T1B2922301353MSC which concerned 'Non Delivery of Permanent Resident Card'. It was answered on 27 Oct 2023 with the document USCISnoGreenCard20231027.pdf which listed 'Type of service requested: -- Non-Delivery of Permanent Resident Card' but answered with:

> You ... contacted U.S. Citizenship and Immigration Services (USCIS) because you have not received your denial, termination or revocation notice. We have enclosed a copy of the notice for your reference. Please note that we are not able to extend the period for you to file an appeal from this decision. Therefore, follow the instructions on your notice carefully and submit accordingly.

There was no notice attached and the text does not make sense with respect to the request for a green card from an approved application. It appears to be the standard form letter message for a denial of a request.

The form letter does mention the requirement to contest an unfavorable decision within 30 days and, of course, pay the $700 fee first. However, as this decision referred to was an approval which was illegally contorted by false pretenses to be an effective denial, the text of the response is not responsive to actual request.

It appears that when USCIS attempts to effectively deny an application by claiming approval based on false pretenses, there is no way to appeal or correct the error other than the federal district courts.

Legal Arguments

Lack of Jurisdiction

Of primary importance is the lack of jurisdiction for USCIS to revise or ignore a prior final decision.

It is well understood that in the interest of justice to all parties in an action, there must be some final closure of arguments and litigation. Final decisions are intended to provide that relief to all parties with the caveat that each party has 30 days to notify all other parties of any pending disagreements. This is normally done through a notice of appeal requirement, generally within 30 days after proof of service of the decision by the prevailing party.

If USCIS had any complaints or concerns with the findings of facts in the I-751 decision of 31 Jan 2023, they should have raised the concerns within 30 days of publication of the decision.

As there is no avenue for USCIS to submit a motion for reconsideration of a matter which was decided by USCIS, the only forum where USCIS can seek redress is a new action in the federal district courts.

To provide otherwise is to deny all applicants to USCIS from the justice of having any final decision.

Lack of Notice to Support Failure to Appear

Another fundamental principle of due process is that all participants must be given adequate and sufficient notice of

any action. It is clearly a travesty of justice to deny an application because of failure to appear when there is no evidence of notice.

In particular, in this case there is compelling evidence showing that Mr. Carr did not receive notice of the upcoming interview until less than 30 days before the interview, i.e. 15 Sep 2023 for a hearing on 11 Oct 2023.

As such, the improper denial must be overturned.

Lack of an Independent and Impartial Tribunal

One of the fundamental premises of due process is to have matters decided by an independent and impartial tribunal. It is important to recognize that Mr. Carr had filed numerous complaints with the DHS OIG concerning malfeasance and other unlawful activities by USCIS. His final complaints were for the federal crimes of falsifying government records by several employees who reported directly or indirectly to the director who made the final decision.

It is absurd to even consider that the Field Office Director, Ms. Montgomery, could be unbiased in resolving a matter in which several of her employees were accused of federal crimes which would surely reflect poorly on her own performance and future career opportunities.

Additional Federal Crimes by Ms Montgomery

One of the foundations of any government of law is to have accurate written records of all proceedings. That is almost certainly why Congress has decided to make it a serious federal crime to falsify any government record.

When Director Montgomery cited the approval of the I-751 application without mentioning the finding of an approval of the N-400 application, she falsified the record.

When Director Montgomery stated 'Further, you have not provided USCIS with a good reason for your absence.' without mentioning the original request to reschedule she committed the crime of falsifying the record by failing to include required fast. Further, Director Montgomery does not mention the extensive documentation of substantial financial and personal impact required to change long standing plans in order to attend the interview. This evidence was provided to USCIS, and she falsified the record by omitting critical facts. The entirety of her decision is based on timely notice and lack of response but she fails to discuss any of the factors which are critical elements of her decision.

Right of Appeal Prohibitive / Denied

The contested decision continues with the following text:

> If you believe that you can overcome the grounds for this denial, you may submit a request for a hearing on Form N-336, Request for a Hearing on a Decision in Naturalization Proceedings, within 30 calendar days of service of this decision (33 days if this decision was mailed). See attached 8 CFR 336.2 (a) and 103.8(b). Without a properly filed Form N-336, this decision will become final. See INA 336.

An initial reading of this paragraph suggests that there are administrative procedures for appealing such bad decisions. However, while USCIS borrows heavily from judicial terminology in describing their processes and procedures creating the semblance of 'due process', the reality is USCIS does not provide any of the elements of due process.

In particular, the required fee to file N-336, request for a hearing, is a hefty $700 while the fee for filing a new N-400 is only $625. Similarly, the filing fee for a motion to reconsider is also $700 as is the fee for filing a 'Notice of Appeal'. For a budget minded applicant, the filing fees with federal district courts are a much more affordable $300 (admittedly heavily subsidized) so that applicants with limited assets may only be able to afford to file with the district courts rather than pursue the absurdly expensive administrative alternatives.

Automated Phone System Prevents Applicants from Being Heard

It is a violation of due process for USCIS to restrict applicants to an automated phone system for all questions, concerns, requests, and evidence.

First of all, USCIS can not require all applicants to have phone access. They must provide a physical address where applicants and their representative or interpreter can ask questions and present concerns, requests, issues, and

evidence. Appointments can not be required though substantial waits may be required without an appointment.

This in person access is required as each applicant must be permitted to be heard whether they have access to a phone or are technically savvy.

Further, it is a violation of due process when the automated phone system hangs up on applicants who are not able to correctly state their needs. The system must instead pass the request on to a human representative to hear the issues of the applicant.

While providing this human access can be a significant expense, it is required for the due process opportunity to be heard.

If USCIS chooses it can also provide online secure messaging to applicants and their representatives as a cost effective way of providing a reliable and less expensive method raising concerns and getting responses.

Easy Appointment of Spouse as Representative

It is a violation of the due process for USCIS to restrict the ability of I-751 applicant's spouse to represent the applicant.

Due process requires the right to representation though not necessarily by an attorney. As the spouse is an American citizen, they almost certainly have better English and U.S. government skills. As such they are an ideal representatives for their immigrant spouses.

In fact it is completely legal and proper for a spouse to represent the other party as needed in a real legal union (a.k.a. marriage). In truth, one of the signs of a fake marriage would be the absence of the citizen spouse to represent the immigrant spouse.

Inclusive Assumptions for Freedom of Information Act Requests

As due process requires that the applicant have full access to all of the evidence presented against him or her, the FOIA default must be to provide all records including audio and video recordings which the tribunal has access to.

Relief Sought

Right to work and travel freely as well as right to vote

The primary relief sought is for Mrs. Carr to receive her Certificate of Naturalization as soon as possible. In particular,

1. Mrs Carr should receive her 48 month extension letter as soon as possible, specifically within one week of the date of resolution of this dispute.

2. Mrs Carr should receive her 10-year Permanent Resident Card as soon as possible. Specifically within one month of the resolution of this matter.

3. Mrs. Carr should have her Oath of Allegiance ceremony scheduled and completed within 1 month and her Certificate of Naturalization issued within 2 months.

Credit for Delay in Granting Citizenship

In addition to the comparatively minor relief of credits for future services with USCIS sought with the original IG complaints, Mrs. Carr is seeking additional credits for the deprivation of the rights of citizenship to include the rights for close family members to seek immigration authorizations as well as the right to vote and such. As it is not possible retroactively grant Mrs. Carr the right to vote and others rights of being a U.S. citizen (such as the right to visit Europe without a European visa) the family members should be credited with twice the delay in her citizenship, i.e. their position in the queue for immigration visas should be adjusted as if their application was received earlier. The doubling of their credit in queue position corrects not only the delay in their application but also they get their citizenship rights (e.g. voting) earlier in compensation for the deprivation of Mrs. Carr's citizenship rights (e.g. voting).

Review of Other I-751 and N-400 Records

The USCIS databases should be queried for all I-751 records processed since 1 Jan 2017 to determine how many

other records were similarly falsified. In particular, now many I-751 applications by quarter were approved but with no permanent resident card issued within 90 days while there was a pending N-400 application as well.

These records should be further categorized according to whether there was a corresponding N-400 interview which was canceled or where an additional N-400 interview was scheduled within 2 years of the approval of the I-751 application.

All such applicants should be similarly credited for future services with USCIS for their use, their families use, or their friends use. In addition, any relatives who apply for immigration visas based on their citizenship status should be credited with double the time of the original applicant's delay.

Falsified Records Must Be Corrected

Further, all falsified records should be deleted (actually hidden to avoid potential database corruption) with new records of a falsified record being inserted at the same date and time of the deleted/hidden record. There should be an additional corresponding record at the current date and time which includes the content of the falsified record for later review.

All reports to congress and other entities which relied on these falsified records must be revised to note the number of records which were previously recorded as processed, but were actually pending correction of the false resolution. The corrected resolutions should be added to current reports as approvals from previously denied falsified records.

Adjustments for Language / Cultural Differences

Just as USCIS has added exemptions for people with medical impairments, as well as exemptions based on age, these exemptions should be extended to consider the education opportunities presented to a particular individual before they were 21. They should also be extended to consider the difficulty in mastering English based on the nation of birth.

For example, there could be an annual review by country of the rate of application for citizenship as well as the rate of granting citizenship. Exemptions should be granted to individuals from countries like Thailand where mastering English is extremely difficult for those who are older and poorly educated. The exemptions should be granted based on age less years of formal training in English sufficient to correct the rate of citizenship approvals to match those of countries such as Canada or the United Kingdom where the rate of granting citizenship is, presumably, highest.

For countries such as Thailand and other Buddhist / Moslem countries, this would likely mean eliminating the English and civics test for all N-400 applicants until the rate of granting citizenship matches that of Canada or the United Kingdom. This would be a valuable measure to eliminate the unlawful discrimination against certain groups based on religion, race, culture, and age.

Credit for Visa Fees when Stranded Overseas

Mrs. Carr should be granted an additional credit for services with USCIS for $80 for the business / tourist visa which was required in order for Mrs. Carr to return to the U.S. when she was stranded in Thailand in 2022. The fee was $160, but it is expected that the Department of State will be asked to provide another $80 credit for their unlawful denial of such a visa to Mrs. Carr in 2017.

USCIS Must Correct Time For Legal Notice

USCIS must cease using improper notices of actions. If USCIS wishes to update it's notice process to record and publish accurate records of the actual date of mailing of notices, 7 Days could be added to the actual date of mailing for notices. Three days for first class mail is insufficient to be confident of prompt receipt. As it generally takes USCIS 6 days to print a notice and prepare it for mailing, this would normally be 43 days after the date of the decision itself.

In the alternative, 45 days could be added to the date of notice to allow time for normal processing of notices and normal mail times. Of course, all such denials based on assumed notice without an accurate record of delivery (signature required mailing or process server), would be conditional and must be easily contestable in the event that there was not actual timely delivery. The applicant must be able to contest the denial without any additional fees by explaining any extenuating circumstances which prevented timely notice or appearance (e.g. applicant was in the hospital and did not receive the notice or was not able to appear or answer while hospitalized).

For all cases where USCIS denied an application for failure to appear and there was not 45 days notice nor any record of the actual date of mailing, all such actions since 1 Jan 2017 must be remanded to USCIS for proper processing overturning all denials where there was not proof of timely notice.

The applicant must be given a credit for the filing fees for the original application as well as having the application opened again for proper consideration. All denial records must be updated to note the denial was overturned due to lack of notice. All reports to Congress and others which were based on the improper denial (showing an application was processed) must be corrected to show that the application was incorrectly denied and has been returned to an active status.

Adjustment of USCIS Fees for Appeal, Reconsideration

USCIS fees for N-336 requests to review, motions to reconsider, notice of appeal, and actual appeal filing must be reduced so that they are not prohibitive. It is suggested that no motion to argue or motion to reconsider should cost more than 5% of the federal district court filing fee (now $300, hence no more than $15). Actual appeal filing fees should not exceed half the district court filing fees, e.g. $150. There must be no fee for N-336 and other motions to reconsider when the applicant is contesting presumptive / conditional denials for failure to appear as the applicant must be provided the opportunity to explain failures in actual notice or extenuating circumstances which prevented appearance or answering (e.g. hospitalization).

The justification for this is to encourage applicants to seek redress with the USCIS rather than going directly to the district courts. It also furthers due process by making the proceedings fair and providing opportunities for applicants to be
heard / argue their cases as necessary.

USCIS Must Restore Interview Waivers and Cease Criminal Background Reviews for I-751 Applications

The administrative policies implemented by prior USCIS director in the 2018 time frame must be rescinded. They do not provide any improvement in enforcement and greatly harm applicants' rights in these matters.

Mrs. Carr is requesting that interview waivers be resumed at an accelerated rate so that at least 2 months of backlog are eliminated each month. Realistically that means that three months of applications must be granted their permanent resident card without further delay.

If there are concerns about applicants not understanding the criminal background questions in English, USCIS can provide written copies of the criminal background questions translated into all the appropriate languages. However, these questions should only be applied to new applicants for visas, not approved permanent residents.

USCIS should immediately begin with interview waivers for the oldest applications, but if USCIS wishes, it can send out new forms to potential waiver recipients asking for authorization to access all of their social media, mobile and credit rating records for both spouses. Failure to provide authorization or the appropriate accounts and addresses would result in a delay of any interview waivers.

Over time, USCIS could develop AI programs which very accurately identify fake marriages based on the contents or lack of social media and other records. Given the vast amount of information available through phone records (e.g. Google's time line which could show the location of each spouse for every day and night of their purported marriage), social media and credit histories, the interview itself appears highly ineffective and very expensive method of identifying fake marriages. A well trained AI program could identify fake marriages with substantially greater accuracy at a fraction of the cost of interviews.

Required Access Provided to Applicants

USCIS must immediately disable hang ups by the automated phone system and instead fail over to a human representative. Further, USCIS must send notices to all active applicants of the address where they can go without any appointment to ask questions and raise concerns. USCIS must respond to in person questions and requests.

Secure messaging systems are no relatively routine technology at this time and should be offered as an addition to the MyUSCIS web page to provide a more reliable and cost effective alternative for those applicants who choose to use this option.

USCIS Must Guarantee Applicants' Right to Representation

USCIS must grant immediate approval to any spouse who files to become an applicant's representative. Further, the application form itself must be adjusted to allow that option on the application itself.

Pending I-751 applicants must be notified immediately of their ability to add their spouse as a representative via a simple phone call.

More Expansive FOIA Responses

USCIS must change its defaults for FOIA requests to provide access to every record including audio and video recordings which reference the requested receipt number.

Conclusion

Mr. and Mrs. Carr ask for the assistance from all recipients in order to provide a speedy resolution of the issues raised above and the relief sought above.

Your attention to this matter is greatly appreciated.

Brian P. Carr and Rueangrong Carr

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-------- Forwarded Message --------

Subject: Fwd: URGENT: Report of Federal Crime in USCIS,, DHS OIG Complaint HLCN1694292030038, Re: CIS Ombudsman Request Number 2022056241

Date: Fri, 6 Oct 2023 19:17:31 -0500

From: Brian Carr <carrbp@gmail.com>

To: criminal.division@usdoj.gov

CC: Joseph Cuffari <joseph.cuffari@oig.dhs.gov>, Kristen Fredricks, DHS OIG Chief of Staff <kristen.fredricks@oig.dhs.gov>, Director USCIS Jaddou <Ur.M.Jaddou@uscis.dhs.gov>, cisombudsman <cisombudsman@hq.dhs.gov>, Ward, Jennifer <Jennifer.Ward@mail.house.gov>

Dear Sir / Madam:

I am writing to request your assistance in correcting malfeasance and unlawful policies and procedures in the United States Citizenship and Immigration Services (USCIS) and Department of Homeland Security (DHS) Office of the Inspector General (OIG). While these violations have resulted in federal crimes of falsification of government records and, potentially, other federal crimes, I am not seeking prosecutions (which are at the sole discretion of DoJ) but rather assistance in getting the agencies to comply with lawful statutes and constitutional rights and to provide relief as appropriate to damaged parties.

The enforcement of lawful statutes and constitutional rights is at the discretion of the Department of Justice (DoJ) based on available resources, but this discretion is secondary to the federal courts and their ability to provide relief to injured parties. However, I believe that the best resolution can be reached by DoJ working directly with the agencies. If federal courts are brought into this matter, it is almost certain the DoJ will be called on to assist but the time table and direction of the corrections will be set by the courts for better or worse.

I ask that you route this request to the appropriate department for the requested assistance and provide me contact information to get the status of the request. As stated above, there are no requirements that you provide the requested assistance, but it is my hope that these issues can be resolved without involving the courts. Needless to say, if the DoJ chooses not to address my concerns, my only avenue for relief will be through the courts.

I am forwarding the most recent email concerning these issues which was sent to the USCIS Director and DHS IG as well as other individuals. It provides the details of unlawful policies and procedures as well as federal crimes. It also

includes the damages and the specific relief sought. I am also copying the other recipients the previous emails.

Your attention to this matter is appreciated.

Brian Carr

-------- Forwarded Message --------
Subject: URGENT: Report of Federal Crime in USCIS,, DHS OIG Complaint HLCN1694292030038, Re: CIS Ombudsman Request Number 2022056241
Date: Sun, 10 Sep 2023 10:39:33 -0500
From: Brian Carr <carrbp@gmail.com>
To: Joseph Cuffari <joseph.cuffari@oig.dhs.gov>
CC: Director USCIS Jaddou <Ur.M.Jaddou@uscis.dhs.gov>, cisombudsman <cisombudsman@hq.dhs.gov>, Ward, Jennifer <Jennifer.Ward@mail.house.gov>, criminal.division@usdoj.gov

Brian Carr
1201 Brady Drive
Irving, TX 75061
carrbp@gmail.com
518-227-0129

The Honorable Joseph Cuffari
Department of Homeland Security Inspector General
245 Murray Dr.; Building 410;
Washington, DC 20528
(202) 981-6000

Dear Honorable Cuffari,

Overview

I am writing to report a federal crime of falsification of government records (and possibly many others) by the staff in United States Citizenship and Immigration Services (USCIS). I ask that you investigate the complaint and, on confirmation that there are reasonable grounds to support the allegation, direct USCIS to take corrective action and refer the matter to the Department of Justice.

In the event that this email is first screened by a person other the Honorable Cuffari, I ask that this matter promptly be called to his attention as it contains a report of federal crimes within USCIS (his purview). Further, if this report is not forwarded to him for his review, it could be construed as another federal crime of Obstruction of Justice (which is clearly within the purview of the Department of Justice (DoJ), also copied on this email).

As this email contains a notice of a plausible federal crime, I ask the Honorable Cuffari acknowledge receipt of this email within seven days (preferably via email to carrbp@gmail.com) as well as provide an initial response within thirty days as to intended actions.

Details of the Crime

The essence of the crime is documents provided by USCIS with contradictory facts, clearly one or both is false. The first document is the official notice that my wife's I-751 petition (for permanent Green Card) and N-400 petition (for citizenship) were approved (see I797forMSC2091582908-ioe9752855294.pdf) in Jan 2023 but the promised Oath of Allegiance was not scheduled. After numerous requests to have it scheduled no action was taken by USCIS until Sep 2023 with T1E2412301031DAL where her petitions were put back in the queue for a second interview (a redo of the original interview where her petitions were purportedly approved) indicating that her petitions were not approved but are still pending.

There are several federal criminal statutes concerning falsification of government records one of which is 18 U.S. Code Section 1001 (cited below) which is broadly applicable and paragraphs 1) and 3) both seem to apply to this matter.

Given the plausible federal crime being alleged, the Department of Homeland Security (DHS) Office of the Inspector General (OIG) is required to investigate the allegation and report all likely federal crimes, e.g. INSPECTOR GENERAL ACT OF 1978 which states in part that the 'Inspector General shall report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law'. A cursory review of the documents in this case should verify that there are contradictory facts in the record and that any competent employee would identify the contradictions.

You are requested to promptly (i.e. expeditiously) report this matter to the DoJ so that they can make the decisions as whether these matters should be further investigated and prosecuted.

Serious Deprivation of Constitutional Rights

Further, the apparent widespread nature of these crimes (discussed below) raises interesting questions of Due Process as guaranteed to all persons (including foreign nationals) in the Fifth Amendment. There were many updates to the procedures for foreign nationals in the Trump era and it is possible that some of these updates were not legal and in accordance with the Fifth Amendment requirements of Due Process.

In order to comply with the Fifth Amendment as defined by the the Supreme Court, all persons must be provided with 'due process' even in administrative proceedings. There is an excellent overview of 'due process' in
https://www.law.cornell.edu/wex/procedural_due_process
citing
https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=5317&context=penn_law_review
in Judge Henry Friendly's article titled "Some Kind of Hearing"

> "procedures that due process requires....
> ...
> 7. A decision based exclusively on the evidence presented.
> 8. Opportunity to be represented by counsel.
> 9. Requirement that the tribunal prepare a record of the evidence presented.
> 10. Requirement that the tribunal prepare written findings of fact and reasons for its decision.

As discussed in the article, the Supreme Court has interpreted the Fifth Amendment due process requirement to cover virtually all administrative procedures which impact a person's life, but with less prohibitive requirements for less significant matters. The right to work and travel freely are most significant and the rights of citizenship (e.g. voting) are even more significant so that the requirements of Due Process are equally significant for USCIS and its concerns.

This particular situation is problematic as USCIS seems to provide final official 'orders' and 'findings of facts' from their tribunal (borrowing from judicial terminology) and then ignore these results with later interlocutory actions (e.g. email putting the petitions into the queue for a second interview). USCIS seems to simply ignore final decisions without any notice or justification.

I would argue that once a final decision is issued, USCIS can not do anything but follow through with the final decision and then turn to the courts if there are any problems which would warrant revoking the citizenship. Of course this is a complex issue and the DoJ should be consulted as there are certainly contrary arguments about USCIS's options after approving petitions.

The actual relief that I am seeking is similarly complex and is listed below in the preceding emails copied below.

Your prompt attention to this matter is appreciated along with acknowledgment of receipt of this email (7 days) and status of the various requests (30 days).

Brian P. Carr

-------- Forwarded Message --------
Subject: URGENT: Report of Federal Crime in USCIS, Re: CIS Ombudsman Request Number 2022056241
Date: Fri, 8 Sep 2023 11:52:25 -0500
From: Brian Carr <carrbp@gmail.com>
To: Director USCIS Jaddou <Ur.M.Jaddou@uscis.dhs.gov>
CC: cisombudsman <cisombudsman@hq.dhs.gov>, Ward, Jennifer <Jennifer.Ward@mail.house.gov>, criminal.division@usdoj.gov

Dear Honorable Jaddou,

Overview

I am seeking assistance in scheduling the Oath of Allegiance for my wife's Naturalization. I am also seeking damages for the unwarranted delays in processing her I-751, Petition to Remove Conditions on Residence, and N-400 Petition for Citizenship. Finally I am asking that USCIS cease its illegal denial of 'due process' rights to foreign nationals as well as federal crimes such as falsification of government records.

In the event that this email is first screened by a person other the Honorable Jaddou, I ask that this matter promptly be called to her attention as it contains a report of federal crimes within USCIS (her purview). Further, if this report is not forwarded to her for her review, it could be construed as another federal crime of Obstruction of Justice (which is clearly within the purview of the Department of Justice (DoJ), also copied on this email).

As this email contains a notice of a plausible federal crime, I ask the Honorable Jaddou acknowledge receipt of this email within seven days (preferably via email to carrbp@gmail.com) as well as provide an initial response within thirty days as to intended actions.

As I have added a new cc recipient (DoJ), I have attached the previous attachments for their convenience.

Federal Crimes, Falsification of Government Records

In response to the notice that USCIS was scheduling new interviews for my wife (email from USCIS dated 1 Sep 2023 shown below in blue) rather than scheduling the Oath of Allegiance as required in the official formal approval of her two outstanding matters (see attached files and email from myself dated 25 Aug 2023 shown at the end of this email), I called USCIS to correct the matter.

On 5 Sep 2023 I called 800-375-5283 and spoke with Destiny, ID G010590, and asked that she send an email to the appropriate party to promptly schedule my wife's Oath of Allegiance as stated in the cited approval notice and, in the alternative, if an N-400 was not actually approved, that my wife be sent a new 10 year Permanent Resident Card.

Destiny, ID G010590, explained that it is not uncommon for additional interviews to be required even after the I-751 and N-400 are approved and that I could not be sent the approved Permanent Resident card (this is my recollection of what she said, though in future FOIA requests we should be able to determine the precise wording of her statement from the audio recordings). Implicitly her statement indicates that such formal approvals are not really approvals but instead delaying tactics used by USCIS to create confusion and delays.

At that time I asked that Destiny, ID G010590, take notes for details to include in the email she would send on my behalf.

I cited 18 U.S. Code Section 1001 which is one of many criminal codes for falsification of government records and states in part:

> (a) ... whoever, in any matter within the jurisdiction of the executive... branch of the Government of the United States, knowingly and willfully --
> (1) falsifies, conceals, or covers up ... a material fact; ... or
> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
> shall be fined under this title, imprisoned not more than 5 years

(3) prohibits taking any action based on a false document with the implicit exceptions that actions may be taken to: correct the false document or, if the individual is not authorized to correct the false document, to report the false document to their supervisor and / or the relevant OIG explaining that it there is an existing false document and a possible federal crime when the document was created.

Whoever entered the final approval apparently knew that neither request was actually approved and entered the false approval with the intent of serious deprivation of due process rights (unwarranted delays and confusion) as well as criminal falsification of government records under 18 U.S. Code Section 1001. I ask that the Honorable Jaddou also refer this report of federal crimes to the Department of Homeland Security (DHS) OIG (Office of the Inspector General) as well as the DoJ if she feels that is appropriate. I will shortly be filing an additional complaint with the DHS OIG as well and will copy the recipients of this email as well.

I am asking that the outstanding I-751 and N-400 requests be immediately fulfilled and my wife promptly receive her 10 year Permanent Resident Card as well as her Certificate of Naturalization. Further I request that all similar applicants with falsified approvals (approval with no Oath of Allegiance scheduled from the approval) be promptly sent

their 10 year Permanent Resident Card as well as their Certificate of Naturalization. If there are pending problems with the new citizens, they should be addressed through the courts as is USCIS's option with any citizen who was not properly eligible for citizenship. Further I am asking for credits for future services with USCIS as well as doubled compensatory time for delays in providing the benefits of U.S. citizenship.

Fraudulent Delays in Removing Remove Conditions on Residence

Since 2017 the delay in processing I-751 requests to remove conditions on permanent residents has increased dramatically because of administrative rule changes on waivers of interviews and increased requirements on the interview itself. The effect of these changes is that delays in actually issuing Permanent Resident cards (without conditions) have increased to four years and almost no Permanent Resident cards are issued. There are virtually no interviews scheduled for I-751 requests (even though applicants pay $680 (proposed to be $1,195) for such an interview) and instead the interviews are only scheduled in conjunction with the N-400 citizenship applications which have a separate $725 fee (proposed to be $750).

As there was never any separate biometrics or interview for the I-751, we should receive a credit for future USCIS services for the $680 we were charged. Further, all I-751 applicants since 1 Jan 2017 (the beginning of the Trump era restrictions on foreign nationals) who did not receive any separate biometrics or interview (not shared with a corresponding N-400 request) should receive a similar credit.

Corrected A-551 Validity Dates and Restrictions on Replacement for Old A-551

8 CFR Section 216.4 states ... 'Upon receipt of a properly filed Form I-751, the alien's conditional permanent resident status shall be extended automatically, if necessary, until such time as the director [of USCIS] has adjudicated the petition.',
The extension letter fails in this regard as it places a unwarranted demands on the resident, travel providers, and employers. It is a lengthy document which does not clearly state the revised expiration date. Even CBP officers (at the airport) were not clear whether the 24 (now 48) months started from the receipt date (too early) or date of notice (too late). It must declare the precise date of expiration so that all parties will know the precise duration of the extension.

However, even beyond the confusing date of expiration, the letter itself puts an undue burden on the resident, travel providers and employers. The resident must carry the rather bulky letter as well as the green card and all travel providers and employers have to spend the time to try to understand the confusing terms including the misdirections about applying for stay outside the U.S. for longer than a year and 'lost document' applications.

The A-551 stamp in the passport is even worse as it requires the resident carry their passport and is only issued on request (not automatic). As such stamps are uncommon and simple, they also invite fraud as the stamp can be trivially duplicated. Further the expiration dates directly restrict the residents ability to travel freely. Permanent residents can leave the United States for up to a year and return without hindrance. However, the A-551 is only valid for 12 months and can not be extended until 60 days before expiration. As such A-551 residents can only leave the United States for 60 days on the 61st day before expiration, a significant restriction on the residents ability to travel freely. As such the expiration date on the A-551 stamp must be a minimum of 13 months with the ability to get a new stamp whenever there is less than a full 13 months remaining. Realistically it would be better to have a 24 or 48 month expiration date with the ability to request a new stamp whenever there is less than 13 months remaining.

I request that a new 48 month extension letter be sent to my wife immediately. Further, as she has received proper notice of approval of her I-751 application, she must be sent a 10 year permanent resident card ('green card') to allow her to work and travel freely as required by law as soon as possible. There is no legislation which prevents permanent residents from having a 'green card' even after they are citizens and it is, in fact, and expensive, arduous, and lengthy process to get a passport for new citizens.

Additional Relief Sought

In addition to the comparatively minor relief of credits for future services with USCIS sought with the original IG complaints, I am seeking additional credits for the deprivation of the rights of citizenship to include the rights for close family members to seek immigration authorizations as well as the right to vote and such. As it is not possible retroactively grant my wife the right to vote and others rights of being a U.S. citizen (such as the right to visit Europe without a European visa) the family members should be credited with twice the delay in her citizenship, i.e. their position in the queue for immigration visas should be adjusted as if their application was received earlier. The doubling of their credit in queue position corrects not only the delay in their application but also they get their citizenship rights (e.g. voting) earlier in compensation for the deprivation of my wife's citizenship rights (e.g. voting).

Conclusion

I ask that my wife be granted the rights of U.S. citizenship as soon as practicable as well as twice the current delay credited for the immigration applications of close relatives. Further, this specific correction should be applied to other N-400 applicants whose citizenship has been similarly delayed.

As there appear to be a significant number of N-400 applications which have been similarly delayed in approval by the false approvals, all such applicants should be similarly credited with twice the delay time for their relatives as well. If these queue disruptions have a significant impact to current queue members, USCIS should apply to Congress for relief of additional slots in each category of delayed immigrants.

The criminal falsification of government records through formal approval notices which are not treated as proper approvals must be investigated and stopped. The collection of fees for services which are never provided (interviews and biometrics) must also be investigated and stopped. Credits for future services must be provided for those who were fraudulently charged for the services which were not provided. In addition the individuals who were deprived of the rights of citizenship through illegal delays and interviews after their formal approval must be credited with twice the period of delay for any relatives who later apply (or applied) for immigration.

Your prompt attention to this matter is appreciated along with acknowledgment of receipt of this email (7 days) and status of the various requests (30 days).

Brian P. Carr

On Fri, Sep 1, 2023 at 10:33 AM USCIS <USCIS-CaseStatus@dhs.gov> wrote:
U.S. Department of Homeland Security
USCIS
6500 Campus Circle Drive East
Irving, TX 75063

U.S. Citizenship and Immigration Services
Friday, September 1, 2023

Emailed to carrbp@gmail.com

Dear Rueangrong Carr:

On 08/29/2023, you or the designated representative shown below, contacted us about your case. Some of the key information given to us at that time was the following:

...

Case type:
-- N400

Filing date:
-- 07/11/2022

Receipt #:
-- IOE-97-528-55294

Referral ID:
T1E2412301031DAL

...

Type of service requested:
-- Outside Normal Processing Times

The status of this service request is:

Thank you for contacting USCIS concerning the above-referenced application. Below is a summary of what we have found.

We have placed your application back in queue for a second interview to be scheduled at a USCIS field office. Once an appointment is available, your interview will be rescheduled, and an appointment notice will be mailed to your current address of record on file with USCIS. If you have not received a new interview notice in 60-days, please feel free to submit a new request to the USCIS contact center.

We hope this information is helpful to you.
...

On 8/25/2023 3:23 PM, Brian Carr wrote:

Dear Ombudsman, Honorable Jaddou,

On 6 Dec 2022 I asked for assistance with my wife's I-751, Petition to Remove Conditions on Residence, from the Honorable Jaddou and, in the same time frame, from the USCIS Ombudsman.

On 29 Jan 2023 my wife and I had a combined interview for the I-751 and N-400 (petition for citizenship). In early February we received the results which are attached as I797forMSC2091582908-ioe9752855294.pdf. For your convenience, the text of the response is:

> We have approved your I-751, Petition to Remove Conditions on Residence. Our records also indicate we have approved your Form N-400 Application for Naturalization. Because we also approved your N-400, you will not receive a new Permanent Resident Card (also known as a Green Card). Instead, once you have taken the *Oath of Allegiance*, you will receive a Certificate of Naturalization, which will be proof of your U.S. citizenship. If you have questions regarding this process, please contact the USCIS contact center at 800-375-5283.

However, when I check the status of our petitions it appears that we are still pending our dual interview or awaiting a decision from the interview (see attached file USCISstatusRC20230825.pdf). When we call the 800 number above we are unable to schedule the Oath of Allegiance or get a Permanent Resident Card even though we are well past the 5 month expected delay to schedule the Oath of Allegiance (most petitioners are able to complete that step in a few days).

Can you please schedule the Oath of Allegiance as my wife is being denied many rights of citizenship by these unreasonable delays? I am copying Ms. Ward on the staff of my U.S. representative, Congressman Veasey, as she may also be asked to expedite the scheduling of the Oath of Allegiance.

Thanks for your prompt attention to this matter.

Brian P Carr

On Mon, Jan 23, 2023 at 7:40 AM cisombudsman <cisombudsman@hq.dhs.gov> wrote:

> Dear Rueangrong Carr,
>
> The CIS Ombudsman's Office has determined that U.S. Citizenship and Immigration Services (USCIS) has reviewed your case and scheduled you for an interview.
>
> You should receive your interview notice by mail at the address USCIS has on file. If you do not receive your notice within 15 days, please contact USCIS at 1-800-375-5283 or through one of the customer service options offered by the agency. Please visit USCIS Tools and Resources | USCIS to obtain additional information and explore the agency's

Customer Service Tools and Resources.

Because USCIS has acted, our office will be closing this matter.

Thank you for giving the CIS Ombudsman's Office the opportunity to assist you.

Please take our customer satisfaction survey. Your feedback is important to us.

Sincerely,

Office of the Citizenship and Immigration Services Ombudsman
U.S. Department of Homeland Security
Washington, D.C.
www.dhs.gov/cisombudsman
/dl
*The Office of the Citizenship and Immigration Services Ombudsman is an **independent**, **impartial**, and **confidential** resource. We advocate for a **fair** and **efficient** immigration process.*

10 attachments

USCISdenyN400-20231013.pdf
197K

I797forMSC2091582908-ioe9752855294.pdf
237K

USCIScancel20230901-20230130.pdf
20K

Uscisl797intrvw20231011.pdf
696K

USCISuspsMailArrivals20230915.pdf
568K

USCISnotReschedule20230919.pdf
571K

PostponeIntervieUntilAfter25Dec2023.pdf
23K

USCISfoiRqst.pdf
548K

USCISstatusRC20230825.pdf
122K

USCISnoGreenCard20231027.pdf
567K

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BRIAN P. CARR, RUEANGRONG CARR, and BUAKHAO VON KRAMER,

Plaintiffs,

v.

UNITED STATES OF AMERICA; U.S DEPARTMENT OF JUSTICE; UNITED STATES POSTAL SERVICE; UNITED STATES POSTAL SERVICE OFFICE OF INSPECTOR GENERAL; USPS COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY; USPS BOARD OF GOVERNORS; DEPARTMENT OF STATE, OFFICE OF INSPECTOR GENERAL; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICE; DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL; and SOCIAL SECURITY ADMINISTRATION,

Defendants.

Civil Action No. 3:23-CV-02875-S

DEFENDANTS' MOTION TO DISMISS
PLAINTIFFS' AMENDED COMPLAINT

Plaintiffs Brian P. Carr and Rueangrong Carr (husband and wife) together with Mrs. Carr's sister, Buakhao Von Kramer sue Defendants the United States of America and several other federal agencies for allegedly having violated the Due Process Clause of the Fifth Amendment to the U.S. Constitution. Plaintiffs seek credit from the United

States Postal Service (USPS) for an allegedly delayed delivery of a package, a court order mandating that various federal agencies including the U.S. Department of Justice initiate investigations into allegedly criminal circumstances surrounding their various attempts to obtain immigration benefits. Plaintiffs' efforts to obtain immigration benefits include seeking lawful-permanent-resident status (commonly known as a "green card") and naturalization for Mrs. Carr and a non-immigrant visa for Mrs. Von Kramer. Plaintiffs also seek a court order mandating that various federal agencies make numerous changes to administrative processes related to visa applications and internal investigations.

Because Plaintiffs cannot meet their initial burden to identify an applicable waiver of the federal government's sovereign immunity, the Court should dismiss Plaintiffs' entire complaint. Even so, the Court lacks jurisdiction over any claim, and Plaintiffs fail to state a claim. For these reasons and those further explained below, Plaintiffs' entire complaint should be dismissed.

I. Background

Plaintiff Brian Carr is a U.S. Citizen who married Plaintiff Rueangrong Carr in Thailand and petitioned, as her spouse, for her to receive lawful-permanent-resident status in the United States (commonly known as a green card), which was expedited and approved within four months' time. Am. Compl. ¶¶ 60, 74, ECF No. 29.

Plaintiff Von Kramer is Mrs. Carr's sister, and in 2019, she desired to travel to the United States. *Id.* ¶¶ 4, 89, 90. But her request for a non-immigrant tourist visa was initially denied; however, her fourth application for a visa was granted in 2022 (about three years later). *Id.* ¶¶ 90, 110, 113. Plaintiffs allege they complained to the State

Department's Office of Inspector General (OIG) about the challenges Von Kramer encountered in attempting to obtain a visa, but the OIG refused to report or investigate allegations of (what Plaintiffs allege constituted) federal crimes. *See id.* ¶¶ 125–34.

In 2022, Plaintiff Rueangrong Carr applied for naturalization. *Id.* ¶ 204. At her scheduled naturalization interview, she initially was unable to write a sentence in English and failed the government and history (civics) portions of the naturalization test. *Id.* She was then scheduled for another interview to retake those portions of the naturalization test, but she did not show up—resulting in the denial of her naturalization application. *Id.* It appears that Mr. and Mrs. Carr had a previously scheduled international vacation that conflicted with the scheduled interview, *id.* ¶ 194, but their request to reschedule the interview was denied, *id.* ¶ 197.

In addition, Mr. Carr in 2021 purchased overnight shipping from the USPS to deliver his passport from the Thai Embassy in Washington, D.C. to his home in Irving, Texas. *See id.* ¶ 27. The package allegedly arrived a day late, and now Mr. Carr wants a credit with the USPS. *See id.* ¶¶ 3, 27. Mr. Carr complained to his Congressman, who allegedly had been informed that a refund had been paid. *Id.* ¶¶ 35–38. Plaintiffs now complain that the USPS official who reported the refund to Mr. Carr's Congressmen had been misled by "numerous falsified documents." *Id.* ¶ 39.

Plaintiffs allegedly notified various government agencies including the U.S. Department of Justice about the circumstances of their challenges in obtaining a visa for Plaintiff Von Kramer, naturalization for Mrs. Carr, and timely delivery (or a refund) of a package for Mr. Carr. *See, e.g.*, *id.* ¶¶ 248–53. But to date, the federal government has

not taken (in Plaintiffs' view) appropriate or timely action to correct allegedly inaccurate records and fix supposedly broken systems (such as USCIS's automated phone system). *See, e.g.*, *id.* at 49–53, ¶¶ 27–47 ("USCIS must immediately disable hang ups by the automated phone system and instead fail over to a human representative.").

II. Legal Standards

A. Rule 12(b)(1)

Defendant moves to dismiss under Rule 12(b)(1) because Plaintiffs have not identified a waiver of sovereign immunity and because the federal government is not liable for the conduct of federal actors under 42 U.S.C. § 1983 or the Fourteenth Amendment. As the party asserting federal subject-matter jurisdiction, the plaintiff must bear "the burden of showing Congress's unequivocal waiver of sovereign immunity." *Freeman v. United States*, 556 F.3d 326, 334 (5th Cir. 2009). "At the pleading stage, [the] plaintiff[ ] must invoke the court's jurisdiction by alleging a claim that is facially outside of the discretionary function exception." *Id.* The Court may dismiss claims under Rule 12(b)(1) based on "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Willoughby v. United States ex rel. U.S. Dep't of the Army*, 730 F.3d 476, 479 (5th Cir. 2013).

B. Rule 12(b)(6) pleading standard

The Court should grant a motion to dismiss under Rule 12(b)(6) if the complaint fails to allege "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Sullivan v. Leor Energy, LLC*, 600 F.3d 542, 546 (5th Cir. 2010).

"Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Sullivan*, 600 F.3d at 546. The "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In assessing the complaint, the Court accepts only "well-pleaded facts as true" and disregards "conclusory allegations, unwarranted factual inferences, [and] legal conclusions." *Singh v. RadioShack Corp.*, 882 F.3d 137, 144 (5th Cir. 2018).

III. Argument & Authorities

The Court should dismiss Plaintiffs' entire amended complaint because Plaintiffs fail to identify any waiver of the federal government's sovereign immunity for the Fifth Amendment due process claims concerning which they seek mandatory injunctive relief. Additionally, the Court lacks jurisdiction to consider any of their various grievances.

A. Plaintiffs have not shown that the federal government has waived sovereign immunity for claims seeking non-monetary relief ordering federal law enforcement to investigate alleged crimes.

As the party invoking federal subject-matter jurisdiction, Plaintiff must bear "the burden of showing Congress's unequivocal waiver of sovereign immunity." *Freeman v. United States*, 556 F.3d 326, 334 (5th Cir. 2009). Plaintiffs have identified no such waiver for their claims for non-monetary relief—meaning Defendants retain sovereign immunity from all of Plaintiffs' claims.

B. The Court lacks jurisdiction over the late-delivery claim against the USPS.

Although Congress through the Postal Reorganization Act waives sovereign immunity for certain categories of claims, "the statute also provides that the [Federal Tort Claims Act or the] FTCA 'shall apply to tort claims arising out of activities of the Postal Service.'" *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 484 (2006). The FTCA in turn limits the federal government's waiver of sovereign immunity with certain exceptions, 28 U.S.C. § 2680, including (pertinent here) that the federal government retains sovereign immunity from "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." *Id.* at 485. Here, because Plaintiffs' claim concerns an allegedly late-delivered package, that claim arises out of the allegedly "negligent transmission of letters or postal matter" such that the federal government retains sovereign immunity. *See id.* Therefore, Plaintiffs' claims concerning the alleged one-day delayed delivery of Mr. Carr's package should be dismissed for lack of jurisdiction.

C. The naturalization statute provides an adequate remedy of which Plaintiffs have not availed themselves, requiring dismissal of Plaintiffs' naturalization-related claims.

Jurisdiction would be unavailable under any other federal statute or doctrine for Plaintiffs' naturalization-related claims because the naturalization statute provides an adequate remedy already. Under 8 U.S.C. § 1421(c), "[a] person whose application for naturalization under this subchapter is denied, after a hearing before an immigration officer under section 1447(a) of this title, may seek review of such denial before the United States district court for the district." Moreover, judicial review under section 1421(c) "shall be de novo, and the court shall make its own findings of fact and

conclusions of law and shall, at the request of the petitioner, conduct a hearing de novo on the application." Moreover, as for timing, if USCIS fails to "make a determination" within 120 days "after the date on which the examination is conducted under such section, the applicant may apply to the United States district court for the district in which the applicant resides for a hearing on the matter." 8 U.S.C. § 1447(b). In other words, the naturalization statute prescribes a hearing de novo before a federal district court and that a petition for naturalization may be filed in federal court within 120 days of the application having been denied. In addition to this establishing robust procedural protections for naturalization applicants more than sufficient for constitutional Due Process, the naturalization statute, therefore, provides "an adequate remedy to challenge any alleged delay in the adjudication of his naturalization application," which precludes judicial review under any other federal statute that could possibly provide jurisdiction. *See, e.g.*, *Tankian v. U.S. Citizenship & Immigr. Servs.*, 652 F. Supp. 3d 812, 818 (S.D. Tex. 2023).

D. Plaintiffs' visa-related claims also fail to state a claim.

As for Mrs. Von Kramer's alleged delays in obtaining a non-immigrant visa to travel from Thailand to the United States, these allegations fail to state a claim under the Fifth Amendment. To state such a claim, a plaintiff must first identify a protected liberty or property interest and then show that the government deprived him of that interest without due process. *See Mendias-Mendoza v. Sessions*, 877 F.3d 223, 228 (5th Cir. 2017). Plaintiffs appear to claim a right to fair "administrative procedures" such that constitutional Due Process "is not an obscure arcane right, but rather a central pillar of

how the U.S. government must act when dealing with individuals." *See* Am. Compl. ¶ 2. Courts have rejected similar claims brought by other plaintiffs, however. *See Smith v. U.S. Dep't of Homeland Sec.*, No. 3:21-cv-02694-E, Doc. 21 (N.D. Tex. Apr. 13, 2022) (citing *Nyika v. Holder*, 571 F. App'x 351, 352 (5th Cir 2014) & *Ohiri v. Gonzales*, 233 F. App'x 354, 356 (5th Cir. 2007)) (holding that "[b]ecause [the plaintiff] has no liberty interest in an adjustment of status, he has failed to state a claim for a due process violation"); *Bemba v. Holder*, 930 F. Supp. 2d 1022, 1029 (E.D. Mo. 2013) (dismissing the plaintiff's Fifth Amendment due process claim based on the government's delayed adjudication of a Form I-485 application, because there is no constitutionally protected liberty interest in adjustment of status). "[T]he failure to receive discretionary relief," such as a non-immigrant tourist visa, "amount to a constitutionally protected deprivation of a property or liberty interest." *Aguilera v. Holder*, 354 F. App'x 882, 884 (5th Cir. 2009) (per curiam). Plaintiffs' constitutional claim cannot prevail.

No other claim could succeed either because it would be barred by the doctrine of consular nonreviewability. "The doctrine of consular nonreviewability has its basis in Congress's plenary power 'to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country.'" *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972). Accordingly, "the denial of visas to aliens is not subject to review by the federal courts." *Centeno v. Shultz*, 817 F.2d 1212, 1213 (5th Cir. 1987). As such the Court lacks jurisdiction to review any decisions by the consular officer in Thailand denying Mrs. Von Kramer's applications for a visa, whether constitutional or statutory.

IV. Conclusion

Because Plaintiffs fail to identify a waiver of sovereign immunity that could possibly justify the sweeping non-monetary relief they seek for the alleged constitutional violations, the Court should dismiss Plaintiffs' entire amended complaint without prejudice. Even so, the Court lacks jurisdiction over each claim because the USPS retains sovereign immunity from tort claims arising from late-delivered packages, the naturalization statute provides adequate remedies for the naturalization-related claims, and the consular nonreviewability doctrine precludes jurisdiction for the visa-related claims. Plaintiffs also fail to state a claim for violation of constitutional due process. For all of these reasons, Plaintiffs' entire amended complaint should be dismissed.

Respectfully submitted,

LEIGHA SIMONTON
UNITED STATES ATTORNEY

/s/ Emily H. Owen
Emily H. Owen
Assistant United States Attorney
Texas Bar No. 24116865
1100 Commerce Street, Third Floor
Dallas, Texas 75242
Telephone: 214-659-8600
Fax: 214-695-8807
emily.owen@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

On May 14, 2024, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I also hereby certify that on this same date, the foregoing document was served via U.S. mail to the Plaintiffs, pro se, listed below:

Brian P. Carr
1201 Brady Dr
Irving, TX 75061

Rueangrong Carr
1201 Brady Dr
Irving, TX 75061

Buakhao Von Kramer
c/o Brian P. Carr
1201 Brady Dr
Irving, TX 75061

/s/ Emily H. Owen
Emily H. Owen

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

Brian P. Carr, Rueangrong Carr, and Buakhao Von Kramer Plaintiffs versus United States, US Department of Justice, USPS, USPS OIG, USPS BoG, US CIGIE, Department of State, Department of State OIG, USCIS, DHS OIG, and SSA Defendants	Civil No. 3-23CV2875 - S Motion to Reconsider Certificate of Conference - OPPOSED

Rule 54b Motion to Reconsider

Summary

On 23 Apr 2024 in the morning this court (Magistrate RR) filed an Order (ECF 26) resolving all pending motions. Shortly thereafter the Defendants filed a Substitution of Counsel Notice replacing Mr. Padis with Ms. Owens (ECF 27). That evening Mr. Carr filed ECF 28, his Reply supporting Plaintiffs' Motion for Partial Summary Judgment (MfPSJ) and Response Opposing Defendants' 56(d) Motion.

This motion is submitted in accordance with FRCP 54(b). In this motion, Plaintiffs raise several concerns about the propriety of the Order and ask that the record in this matter include a review by the court of ECF 28 and, based on that review, that the court resolve the issue of whether Defendants' 56(d) Motion was incorrectly filed as FRCP Rule 56(d) does not support separate Motions but rather relies on Affidavits attached to Rule 56 Responses, i.e. the Defendants should have filed the

pleadings and affidavit as a Rule 56 Response rather than a Rule 56(d) Motion.

The court is also asked to correct the summary of the complaint where it stated 'various attempts by Ms. Carr and Ms. Von Kramer to obtain immigration benefits. See Compl. (ECF No. 3)' which is both false (in part) and misleading (in part).

Motion to Reconsider Proper

FRCP Rule 54(b) states:

> any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

No Certificate of Conference for 56(d) Motion

In Defendants' 56(d) Motion (ECF 22), Defendants oddly enough complains that there is no Certificate of Conference for the MfPSJ (even though Local Civil Rule LR 7.1 clearly excludes Motions for Summary Judgment from conferences for obvious reasons) but then does not attach any certificate for the 56(d) Motion. As there is no listing in Local Civil Rule LR 7.1 for 56(d) Motions, it must be considered 'Other' which do require a certificate.

It is also true that Mr. Padis did send an email to Mr. Carr asking if Mr. Carr OPPOSED the 56(d) Motion, but it was a few hours before filing the motion (ECF 22). Mr. Carr responded later that evening that he OPPOSED the motion, but Mr. Padis did not ever file any Certificate of Conference for ECF 22. As such, the

56(d) Motion should be considered OPPOSED and the Plaintiffs must be given an opportunity to respond.

Order Premature

Plaintiffs are contesting the propriety of the Order denying their MfPSJ and granting Defendants' 56(d) Motion while the Plaintiffs still had time to file opposition pleadings.

In that regard, Plaintiffs' pleadings submitted just after the Order were timely as the Plaintiffs had 7 days to submit their Reply supporting the MfPSJ, i.e. 24 Apr 2024 is 7 days after 17 Apr 2024. If the Defendants 56(d) Motion were correctly categorized as a Rule 56 Response, then the same 24 Apr 2024 would be applicable. As a 56(d) Motion, the Plaintiffs had until 8 May 2024 for their Response.

Mr. Carr had spent five days preparing the pleadings and did not notice the court's Order or Defendants' Notice until he was ready to submit the Reply (ECF 28) and only revised the submitted document to correct the internal reference to the attached exhibit (ECF 28-1).

There are serious Due Process concerns for any decision which is made before a party is given the opportunity to respond.

Further, as the Defendants Notice of Substitution of Counsel came just hours after the Order there is some indication that the Defendants had conferred with the court about how to manage the transition between counsel. It would not be fair for Ms.

Owen to pick up in the middle without some resolution of pending matters, especially considering the anticipated Motion for Sanctions for the delays attributed to Mr. Padis.

Mr. Carr understands the challenges the court must have in dealing with contentious parties (much like herding cats) and trying to expeditiously and justly resolve matters. Even so, in the future Mr. Carr would like to be included in any conferences to expeditiously move things forward.

Desire for Prompt Resolution

Whenever Mr. Carr has an opportunity he advocates a prompt resolution to Mrs. Carr's plight. Even though USCIS informed Mrs. Carr on 31 Jan **2023** (over a year ago) that her I-751 application (for a ten year green card) and N-400 application (for citizenship) were both approved (ECF 10-5) and she only needed to take the Oath of Allegiance to become a citizen, the reality is that at this time she has not been permitted to take the Oath of Allegiance to become a citizen and is an apparent 'undocumented alien' (a.k.a. 'illegal').

All USCIS documents of her lawful permanent resident status have expired (ECF 24-1, 18-6, 20-2), and, contrary to law[1], with no ten year 'green card' she has realistic fears of being deported at any time by ICE (she doesn't trust U.S. immigration), vigilantes (under Texas SB4), or National Guardsmen (to deport millions of illegals who are poisoning the blood of our nation on day one).

1 INA 264 is 8 USC section 1304 which in (d) states:
(d) Certificate of alien registration or alien receipt card
Every alien in the United States who has been registered and fingerprinted under the provisions of the Alien Registration Act, 1940, or under the provisions of this chapter shall be issued a certificate of alien registration or an alien registration receipt card...

Statutory Justification for 56(d) Motion Challenged

In Plaintiffs' ECF 28 Response Opposing Defendants 56(d) Motion (ECF 22), the Plaintiffs challenged the statutory justification for 56(d) Motions. As this court and 5th Circuit Court routinely discuss 56(d) Motions it is expected that this court will find that 56(d) Motions have sufficient statutory basis.

However, in the event that this matter is reviewed by the Supreme Court (perhaps to review the Doctrine of Consular Non Reviewability), Mr. Carr would like the record to reflect that 56(d) Motions were contested. There are other Circuit Courts (e.g. 3rd) which insist that such responses be in the form of Rule 56 Responses with supporting Affidavit. The Supreme Court could choose to resolve any confusion concerning 56(d) Motions and Rule 56 Responses.

Correction to Orders Summary

The findings of 23 Apr 2023 (ECF 26) should be corrected insofar as it states 'various attempts by Ms. Carr and Ms. Von Kramer to obtain immigration benefits. See Compl. (ECF No. 3)'.

Plaintiffs believe a more accurate summary would be

> Mrs. Von Kramer seeks Declaratory Relief for the three years when she was prevented from visiting the U.S. to establish her 'lawful presence' for SSA benefits (verified Amended Complaint ECF 29, pg 48, relief 15). This is not an immigration benefit. Department of State (DoS) provides non-immigration visas and the Complaint (ECF 29) Count 4, para 85 to 117 describes how DoS prevented Mrs. Von Kramer from the visiting the U.S..
>
> Mrs. Carr seeks her ten year 'green card' in accordance with INA 264(d) as soon as possible so that she will no longer be an apparent 'undocumented

alien'. This is an immigration benefit as authorized by USCIS in its decision of 31 Jan 2023 (ECF 10-5), but it is not discretionary to USCIS at this time (Verified Amended Complaint ECF 29, pg 49, relief 20).

Mrs. Carr also seeks her Certificate of Naturalization (Verified Amended Complaint ECF 29, pg 49, relief 20) as authorized by USCIS in its decision of 31 Jan 2023 (ECF 10-5). By USCIS internal nomenclature, this is a naturalization benefit, not immigration.

Conclusion

This court is asked to review Plaintiffs Reply and Response (ECF 28) and so note in the record.

The court is asked to update its decision concerning the relief sought by Mrs. Carr and Mrs. Von Kramer to conform with the original complaint (ECF 3) and Verified Amended Complaint (ECF 29).

The court is also asked to rule on the legality of 56(d) Motions. While Mr. Carr is formally advocating that such motions be replaced with Rule 56 Responses, the proposed Order will uphold 56(d) Motions out of consideration of 5th Circuit decisions and this courts previous decisions.

Respectfully submitted,

Verification of Motion

The Plaintiff hereby affirms under penalty of perjury in both the United States and Thailand that as an individual:

1. I have reviewed the above motion and believe all of the statements to be true to the best of my knowledge.
2. I have reviewed the associated documents and exhibits and believe them to

be true and accurate copies with the exception of the documents identified as being redacted. The redacted documents have only been altered to remove sensitive personal information according to normal redaction procedures.

I hereby reaffirm that the above is true to the best of my knowledge under penalty of perjury in both the United States and Thailand.

/s Brian P. Carr

_____

Brian P. Carr
1201 Brady Dr

Irving, TX 75061

Date: 14 May 2024

Location: Irving, Texas

Certificate of Conference

This Motion for Sanctions is OPPOSED

The conference was held via an email discussion with Ms. Owen's response on 14 May 2024.

/s Brian P. Carr

_____

Brian P. Carr
1201 Brady Dr
Irving, TX 75061

CERTIFICATE OF SERVICE

On the recorded date of submission, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I also hereby certify that on this same date no copies were served via U.S. mail as all parties in this matter were enrolled in the court's electronic case filing (and service) system.

/s Brian P. Carr

_____

Brian P. Carr
1201 Brady Dr
Irving, TX 75061

RC

Rueangrong Carr

View profile (/account/applicant/profile)

Your Cases

I-751 Petition to Remove Conditions on Residence

Submitted on August 29, 2020 | **Receipt #** MSC2091582908

Remove ()

N-400 Application for Naturalization

Submitted on July 11, 2022 | **Receipt #** IOE9752855294

View PDF

Estimated time* until case decision:
Your case is taking longer than expected to process. You will be notified if you need to take any action.

**These completion projections are based on case processing for applicants who have been lawful permanent residents for at least 5 years. For all other applicants, completion projections may vary.*

Case Status | Case History | Documents

December 23, 2022

Interview Was Scheduled

On December 23, 2022, we scheduled an interview for your Form N-400, Application for Naturalization, Receipt Number IOE9752855294. We will mail you an interview notice. Please follow any instructions in the notice. If you move, go to www.uscis.gov/addresschange (https://egov.uscis.gov/coa/displayCOAForm.do) to give us your new mailing address.

Current as of today at 2:18 pm

Re: CIS Ombudsman Request Number 2022056241 for Rueangrong Carr: Interview scheduled

Brian Carr <carrbp@gmail.com> Fri, Aug 25, 2023, 3:23 PM
to Director, cisombudsman, Jennifer

Dear Ombudsman, Honorable Jaddou,

On 6 Dec 2022 I asked for assistance with my wife's I-751, Petition to Remove Conditions on Residence, from Honorable Jaddou and, in the same time frame, from the USCIS Ombudsman.

On 29 Jan 2023 my wife and I had a combined interview for the I-751 and N-400 (petition for citizenship). In ea February we received the results which are attached as I797forMSC2091582908-ioe9752855294.pdf. For you convenience, the text of the response is:

> We have approved your I-751, Petition to Remove Conditions on Residence. Our records also indicate v have approved your Form N-400 Application for Naturalization. Because we also approved your N-400, you will not receive a new Permanent Resident Card (also known as a Green Card). Instead, once you have taken the *Oath of Allegiance*, you will receive a Certificate of Naturalization, which will be proof of your U.S. citizenship. If you have questions regarding this process, please contact the USCIS contact center at 800-375-5283.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

Brian P. Carr, Rueangrong Carr, and Buakhao Von Kramer Plaintiffs versus United States, US Department of Justice, USPS, USPS OIG, USPS BoG, US CIGIE, Department of State, Department of State OIG, USCIS, DHS OIG, and SSA Defendants	Civil No. 3-23CV2875 - S Motion for Partial Summary Judgment Certificate of Conference - OPPOSED

Motion for Partial Summary Judgment

Mrs. Carr is in Dire Circumstances

Immediate Relief Justified and Required

Even though USCIS informed Mrs. Carr on 31 Jan **2023** (over a year ago) that her I-751 application (for a ten year green card) and N-400 application (for citizenship) were both approved (ECF 10-5) and she only needed to take the Oath of Allegiance to become a citizen, the reality is that at this time she has not been permitted to take the Oath of Allegiance to become a citizen and is an apparent 'undocumented alien' (a.k.a. 'illegal').

All USCIS documents of her lawful permanent resident status have expired (ECF 24-1, 18-6, 20-2), and, contrary to law[1], with no ten year 'green card' she has

1 INA 264 is 8 USC section 1304 which in (d) states:
(d) Certificate of alien registration or alien receipt card
Every alien in the United States who has been registered and fingerprinted under the provisions of the Alien Registration Act, 1940, or under the provisions of this chapter shall be issued a certificate of alien registration or an alien registration receipt card...

realistic fears of being deported at any time by ICE (she doesn't trust U.S. immigration), vigilantes (under Texas SB4), or National Guardsmen (to deport millions of illegals on day one who are poisoning the blood of our nation).

In addition, for over a year Mrs. Carr has been deprived of the rights of citizenship which were authorized in the USCIS decision of 31 Jan 2023 (ECF 10-5) which includes the right to vote but also to assist her eldest son in seeking better employment (Thailand is still suffering from the effects of Covid restrictions).

USCIS No Longer Has Discretion in This Matter

Prior to the final Findings, Decision, Order, and Notice on 31 Jan **2023** in ECF 10-5, USCIS had wide discretionary latitude but once USCIS had approved Mrs. Carr's ten year green card (I-751) and citizenship (N-400 naturalization) USCIS had no discretion but instead must perform the administrative tasks as mandated by statutes in INA 264(d) and INA 337(a)[2]

No Further Delays

Defendants have repeatedly sought to delay any resolution in these matters.

On 1 Mar 2024 Mr. Padis apparently attempted to trick the Plaintiffs into giving Defendants almost 60 days extension by lying about there being no records of

2 INA 337(d) which is 8 USC 1448(d) states:
(d) Rules and regulations
The Attorney General shall prescribe rules and procedures to ensure that the ceremonies conducted by the Attorney General for the administration of oaths of allegiance under this section are public, conducted frequently and at regular intervals, and are in keeping with the dignity of the occasion.
This statute was the basis for 8 CFR 337.2 Oath administered by USCIS ...
(a) Public ceremony. An applicant for naturalization ... must appear in person in a public ceremony.... Naturalization ceremonies will be conducted at regular intervals as frequently as necessary to ensure timely naturalization, but in all events at least once monthly where it is required to minimize unreasonable delays.

service and pretending that he had no access to the Complaint and Summons[3], but Mr. Carr saw through that ruse and on 3 Mar 2023, Mr. Carr informed Mr. Padis of the plight of Mrs. Carr and provided Mr. Padis with a copy of the critical USCIS decision of 31 Jan 2023 (ECF 10-5).

Instead of providing some expeditious relief to Mrs. Carr, Mr. Padis instead filed the meritless Motion to Dismiss on 8 Mar 2024 (ECF 15) which served no effect other than 66 days of delay.[4] It is also important to note that while Mr. Carr has constantly reminded Defendants and the Court of the critical USCIS decision of 31 Jan 2023 (ECF 10-5), at no time have the Defendants mentioned that decision in any of their pleadings. While omitting critical facts may make it easier to claim that a cause of action has no standing, it does not actually make it true. Such blatantly false and misleading pleadings should warrant sanctions.[5]

Conclusion

Mrs. Carr seeks her ten year 'green card' in accordance with INA 264(d) as soon as possible so that she will no longer be an apparent 'undocumented alien' or an 'illegal'.

Mrs. Carr also seeks her Certificate of Naturalization as soon as possible in accordance with INA 337(a) and 8 CFR 337.2.

Respectfully submitted,

---

3 See the email thread in ECF 28-1 and Mr. Carr's Affirmation ECF 30-4

4 See ECF 30 on 09 May 2024, Mr. Carr's Motion for Sanctions against Mr. Padis.

5 FRCP Rule 11(c)(3) states:
(3) On the Court's Initiative. On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

Verification of Motion

The Plaintiff hereby affirms under penalty of perjury in both the United States and Thailand that as an individual:

1. I have reviewed the above motion and believe all of the statements to be true to the best of my knowledge.
2. I have reviewed the associated documents and exhibits and believe them to be true and accurate copies with the exception of the documents identified as being redacted. The redacted documents have only been altered to remove sensitive personal information or other redactable information (as cited in the redaction) according to normal redaction procedures.

I hereby reaffirm that the above is true to the best of my knowledge under penalty of perjury in both the United States and Thailand.

/s Brian P. Carr

_____

Brian P. Carr
1201 Brady Dr

Irving, TX 75061

Date: 15 May 2024

Location: Irving, Texas

Certificate of Conference

The foregoing Motion is OPPOSED

Local Civil Rule LR 7.1 clearly excludes Motions for Summary Judgment from any need for a conference (for obvious reasons). No conference was held and LR 7.1 directs that all motions which do not have a conference should be considered OPPOSED.

/s Brian P. Carr

_____

Brian P. Carr
1201 Brady Dr
Irving, TX 75061

CERTIFICATE OF SERVICE

On the recorded date of submission, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I also hereby certify that on this same date no copies were served via U.S. mail as all parties in this matter were enrolled in the court's electronic case filing (and service) system.

/s Brian P. Carr

_____

Brian P. Carr
1201 Brady Dr
Irving, TX 75061

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

Brian P. Carr, Rueangrong Carr, and Buakhao Von Kramer Plaintiffs versus United States, US Department of Justice, USPS, USPS OIG, USPS BoG, US CIGIE, Department of State, Department of State OIG, USCIS, DHS OIG, and SSA Defendants	Civil No. 3-23CV2875 - S Plaintiffs' Response to Defendants' Motion to Dismiss (ECF 31) of 14 May 2024

Response to Defendants' Motion to Dismiss

Defendants' Arguments Lack Specificity

This is a moderately complex case with three distinct Plaintiffs, eleven Defendants, three primary causes of action and nine counts. There are over 250 affirmed statements in the now verified Complaint and over 50 specific reliefs sought.

The U.S. Attorney for the Northern District of Texas (hereafter USATXN) makes broad criticisms such as failure to state a claim and sovereign immunity[1] and malformed Doctrine of Exhaustion of Remedies and Executive Discretion challenges. Each of these claims are meritless supported only by misleading summaries and false conclusions. Sanctions are suggested for wasting the Courts and the Plaintiffs time.

1 USATXN claims:
Because Plaintiffs cannot meet their initial burden to identify an applicable waiver of the federal government's sovereign immunity, the Court should dismiss Plaintiffs' entire complaint. Even so, the Court lacks jurisdiction over any claim, and Plaintiffs fail to state a claim.

Challenge to Doctrine of Consular Non Reviewability Expected

Appeal to Fifth Circuit Court Likely

Attention of Judge Scholer Requested

I apologize to the court for the length of the various responses, but with the many facets of this case and lack of specificity in USATXN's criticisms a full response is required. To aid the court, a high level summary is included in this Response with a more detailed analysis in separate affirmations as well as references to the Plaintiffs' previous Response (ECF 18) to the Defendants' previous Motion to Dismiss (ECF 15).

Further, as we intend to expand on existing challenges to the offensive (to us) Doctrine of Consular Non Reviewability (DoCNR) raised by USATXN relying on Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (citizen rights can bypass DoCNR), Patel v. Reno, 134 F.3d 929, 121 F.3d 1277 (9th Cir. 1997) (APA may override DoCNR), and Sandra Munoz v. State Department (9th Cir. 2022, 21-55365) (spouse of citizen is an exception to DoCNR) it is likely that this case will be appealed to the Fifth Circuit Court and it is plausible that it might be heard by the U.S. Supreme Court.

As the different facets of this case are subtly inter-related in complex ways, if any aspect of the case is stricken by an interlocutory order, the court is asked that Judge Scholer make the decision so that with the likely appeal all the decisions appealed will be from the same Judge (a matter of preference rather than right). For this reason I also request that the prior Motion to Reconsider (ECF 32, 14 May 2024) is decided by Judge Scholer to establish a complete record for the appeal.

USATXN Background is Misleading and False

USATXN summarizes by selectively including minor details which were included for context only and completely omitting the important and relevant facts. When just citing minor details is not enough to mislead the court, USATXN even gets the unimportant details wrong causing further confusion. These misleading and false restatements are then used to reach false conclusions.

As discussed above, I have attached a separate affirmation with my analysis of the misleading summary by USATXN in ECF 34-5, MisleadingSummarization.pdf.

Rule 12(b)(1) Unfounded Challenge of Sovereign Immunity

In USATXN's 'II. Legal Standards - A. Rule 12(b)(1)' makes numerous citations concerning Sovereign Immunity but all the claims are conclusory and there are no specific references to any particular count (there are nine). As such there is a detailed discussion of each count which addresses Sovereign Immunity and demonstrates that Sovereign Immunity does not apply to any count. This entire challenge by USATXN is unfounded.

The restrictions on Sovereign Immunity are discussed at length in my Response of 18 Mar 2024 (ECF 18) pages 1 to 4 and won't be repeated here.

Rule 12(b)(6) Unfounded Claims of Failure to State a Claim

In USATXN's 'II. Legal Standards - B. Rule 12(b)(6) pleading standard' there are again numerous citations concerning failure to state a claim, but there are no references to any particular count or claim. Of course, USATXN's misleading 'Background' does cite selected facts which do not appear to support any claim, but

if the alternate background in ECF 34-5, MisleadingSummarization.pdf is considered there are clearly all the required facts to support all nine counts. Each of the counts will be discussed in detail in separate affirmations where the elements of each claim are clearly established.

III. A. Sovereign Immunity for Investigating Alleged Crimes

In the title of this section, USATXN states the entirety of this confusing claim of Sovereign Immunity with:

> Plaintiffs have not shown that the federal government has waived sovereign immunity for claims seeking non-monetary relief ordering federal law enforcement to investigate alleged crimes.

It then cites the usual Sovereign Immunity cases, but adds:

> Plaintiffs have identified no such waiver for their claims for non-monetary relief - meaning Defendants retain sovereign immunity from all of Plaintiffs' claims.

This is troubling as nowhere in the complaint is 'federal law enforcement' mandated to investigate any alleged crimes.

OIGs Only Required To Report Allegations

As is made clear in the OIG counts, each OIG can refer any plausible allegation of a federal crime to any party it chooses (normally local management) as long as the plausible allegation of a federal crime is first reported to DoJ. The could just be an email in the simplest case.

This referral is an alternative to investigating an allegation to determine if the allegation is likely and, indeed, it would be better if the OIG investigated plausible

allegations, but as we live in a world of finite resources (and limited budgets) the option to refer the allegation must be available to each OIG.

DoJ Not Mandated to Investigate Any Alleged Crimes

DoJ could be construed as 'federal law enforcement' though its mission is worded as 'uphold the law' which has different nuances (see Count 9 summary below and ECF 34-4, CIGIEdojCnt6-9.pdf). Enforcement tends to imply prosecution, but in every case we have clearly specified that prosecution is exclusively at the discretion of DoJ. 'Uphold the Law' implies more about preventing future violations, but I have to admit that two phrases could be considered as synonyms. However, this is all superfluous as the relief sought from DoJ is only about preventing future violations and providing redress to victims as appropriate and possible.

Further, as with the various OIGs, DoJ is not required to investigate any plausible allegations. On receiving a report of a plausible allegation DoJ has the option of referring the matter to another party such as the relevant OIG (if the report didn't come from the OIG) or local management (if the OIG did not already refer the matter to local management).

The only mandate for DoJ is to monitor the results and insure that there is future compliance and, to the degree possible and appropriate, redress for past victims. Nowhere is DoJ mandated to investigate anything.

USPS Case Study

With the 1.9 million false delivery times from the USPS OIG 2017 Audit (see ECF

18-7 DR-AR-18-001) the solution can be as simple as insuring that USPS management implements the USPS OIG recommendations to resolve the problem. No investigation would be required by DoJ other than reading and understanding the audit and insuring that USPS management is aware of the importance of future compliance.

DoJ would also have the option of using the threat of prosecution as a cudgel to insure compliance as well as appropriate redress. The result likely would be lower quality measurements for USPS, but they would be accurate measurements instead of fake measurements. USPS management bonuses would also likely negatively impacted but this is not necessarily a bad thing as it would be 'Pay for Performance' rather than 'Pay for Fake Performance'.[2]

Conclusion

This particular 'Argument' is completely without merit as DoJ is not mandated to investigate any plausible allegation of federal crimes but retains the option to refer the matter to another party and monitor the results.

There are serious issues about DoJ executive discretion but that is addressed in detail in Count 9. Executive discretion is discussed in general in my Response of 18 Mar 2024 (ECF 18) pages 4 to 6. The essence is that as Congress has designated DoJ as the sole agency to 'uphold the law', then all Executive constitutional requirements to 'uphold the law' fall on DoJ to include upholding all lawful statutes and court decisions.

2 It is exceedingly unrealistic to consider incarcerating the estimated 40,000 drivers who scanned false delivery times. There is no aspect of that scenario which is even remotely possible.

III. B. No Jurisdiction over USPS late-delivery claim

The full title of this argument is:

> B. The Court lacks jurisdiction over the late-delivery claim against the USPS.

USATXN cites Dolan v. Postal Service, 546 U.S. 481 (2006) but it is apparent that USATXN has not read Dolan which clearly indicates that we could seek a refund for 'Guaranteed Delivery'. However, instead we seek a credit for future services which is supported as described in full in Count 1 below.

III. C. Court Lacks Jurisdiction as INA Provides Adequate Remedy

The full title of this argument is:

> C. The naturalization statute provides an adequate remedy of which Plaintiffs have not availed themselves, requiring dismissal of Plaintiffs' naturalization-related claims.

This has to be the most absurd of USATXN arguments. USATXN cited 8 USC section 1421(c) which allows us to seek relief with this court from any N-400 denial which we did citing INA as jurisdiction. Out of an abundance of caution the Verified Amended Complaint included a minor change of explicitly listing 8 USC section 1421(c) in the jurisdiction and specifically cited 8 USC section 1421(c) in Relief 20.

As we are seeking the relief cited, how are we not availing ourselves of that relief?

To add to the absurdity USATXN cites 8 USC section 1447(b) which says that if USCIS has not made a determination within 120 days of an interview we can apply

to this court "for a hearing on the matter". The problem is that the interview was on 30 Jan **2023** and on on 31 Jan **2023** (one day later and over a year ago) USCIS made its notice and decision which stated that my wife's I-751 application (for a ten year green card) and N-400 application (for citizenship) were both approved (ECF 10-5) and she only needed to take the Oath of Allegiance to become a citizen.

USATXN has been aware of the critical USCIS Notice and Decision of 31 Jan 2023 since 3 Mar 2024 when I sent Mr. Padis a copy and informed him of my wife's plight, but at no time has USATXN addressed that document (ECF 10-5) in any pleading to the court. However, just because USATXN never mentions the decision it does not make it any less real.

In the complaint there are numerous affirmed statements of false and contradictory documents by USCIS which led to the later denial on 13 Oct 2023 (ECF 10-10) but our foremost challenge to that later decision is that USCIS had no jurisdiction to reopen a resolved matter.

USATXN goes on to cite Tankian v. U.S. Citizenship & Immigr. Servs., 652 F. Supp. 3d 812, 818 (S.D. Tex. 2023) having mangled the citation as it is actually Tankoano v. U.S. Citizenship and Immigration Services, 652 F.Supp.3d 812, 818 (S.D. Tex. 2023) which has no relevance as it is about a 5 year statute of limitations for applying for relief from adverse USCIS decisions.

It is unclear why USATXN included this argument as it does nothing but waste our time (the court's and the Plaintiffs')

III. D. Plaintiffs' visa-related claims also fail to state a claim.

This argument is actually two separate arguments. The first is the challenge of executive discretion. The second is the offensive (to us) Doctrine of Consular Non Reviewability (DoCNR).

No Basis For Executive Discretion Challenge

Executive discretion is very dependent of the specific statutes to regulate the function. In this case it is the INA statutes concerning visa applications and granting or denying visas.

None of the cases cited has anything to do with DoS or visa processing and so are not applicable. The specific failings of this argument is discussed in my Response of 18 Mar 2024 (ECF 18) pages 12 and 13 and won't be repeated here except to note that USATXN cites Aguilera v. Holder, 354 F. App 882 which specifically states that it is not precedent. This court is asked to consider sanctions for this needless violation of the decision of the 5th Circuit Court.

Munoz Refutes Executive Discretion and DoCNR

A much more appropriate case to cite to demonstrate that DoS visa issuance is governed by statutes is Sandra Munoz v. State Department (9th Cir. 2022, 21-55365). In this case DoS is corrected for issuing a denial which cited the relevant statute but did not include the evidence which was considered in denying the visa. This is the exact problem in Count 3 (my wife) and Count 4 (Mrs. Von Kramer) visa denials.

Munoz is also of particular interest as it held DoCNR was not applicable as it infringed on the rights of a citizen spouse which is exactly the situation in Count 3 where DoS denied my wife's visa without Due Process. It also opens the door to ancillary review of the entire visa process as there are undoubtedly other spouses of citizens who wish to travel together.

These challenges are discussed in detail in my attached affirmation, DoScnt3-4-5.pdf, ECF 34-2 as well as my Response of 18 Mar 2024 (ECF 18) pages 13 through 23. They are also elaborated below when the claim in counts 3 and 4 are properly stated.

Count 1, USPS Claim is Simple and Sound

I purchased an Overnight Express 'Click-N-Ship' label with ‘Guaranteed Delivery’. The package arrived at my house a few minutes late which was not a big deal. However, according to the terms of the ‘Guaranteed Delivery’ because of the delay I was permitted to get a refund to my credit card for the cost of the label, $26.35. I went online and after overcoming a few minor hurdles, I was promised a refund to my credit card. The problem is that the refund never showed up with my credit card and I was not able to get the transaction ID of the refund (to correct any error at my bank) or get anyone at USPS to straighten out the problem. At this time, I am seeking a credit for future services of $26.35.

The Complaint (ECF 29) lists all the facts related to the Count in great detail and I have attached an affirmation USPScnt1-2.pdf as ECF 34-1 which lists all the relevant statutes and case law to fully state this claim.

Count 2, USPS OIG Claim Extraordinary in Scope

Delivery Time Falsified, Scanned While Still At Post Office

To explain Count 2, I need to go into the details of the delayed delivery in greater detail. In ECF 18-4 there is the tracking of the delayed package. A critical entry is 13 Apr 2021 at 8:46pm when USPS accepted the package. Because of the limits on 'Guaranteed Delivery' at that time, the late acceptance on the 13th guaranteed delivery by noon on the 15th. The entries on the 15th have:

* 6:52am, the package arrived at DFW / Coppell distribution center
* 11:18am, the package arrived at Irving Post Office (just a few miles away)
* 11:29am, package out for delivery
* 11:35am, package delivered

After the substantial delay in getting package to the Irving Post Office, the delivery time of 11:35am is suspect, only six minutes after the driver was given the packages to deliver.

USPS OIG 2017 Audits Documents

Extraordinary Problem With Falsified Delivery Times

It is clear that the driver falsified the delivery time with an improper 'stop the clock' scan done while the driver was still at the Post Office as described in the USPS OIG 2017 audit (see ECF 18-7 DR-AR-18-001). That audit found 1.9 million falsified delivery times (out of the 25.5 million scans in the audit) which were scanned while the driver was still at the Post Office[3].

These delivery times are very important at USPS and are used for personnel

3 In the audit, 'delivery unit' is the term for the location where the driver gets the packages to deliver, commonly the local Post Office.

retention, promotion, and even bonuses for USPS management. At the conclusion of the audit, USPS OIG made several recommendations for how such improper 'stop the clock' scans could be gotten under control with measures such as updating the scanner so that it would not scan as delivered while the driver was still at the Post Office.

However, the implementation of these measures was left to USPS management and USPS management decided not to fund the measures. This is not surprising as USPS management benefits from these falsified delivery times to include, among other things, increased bonuses. As a result, this problem has persisted for well over a decade.

Refund Blocked by Broken Business Processes

When I got an email saying the package was delivered at 11:35am I was excited and went to collect the package only to become concerned as the package wasn't there and I feared that it had been delivered to the wrong address. I called the Post Office and was told not to worry as the driver was running late and that my package should arrive soon. That made no sense to me as I was not familiar with improper 'stop the clock' scans. I checked at noon with my wife and took pictures showing the package was not there. At 12:30pm I checked again and the package was in our mailbox.

I had numerous difficulties getting the refund approved due to business process delays such as automatic denial of refunds when the delivery time is recorded as on time. Then there is a mandatory two week delay before you can appeal but also a three week limit on any corrections in falsified delivery times (as explained by

USPS management, see ECF 11-2). It is apparent that USPS business processes have evolved so that customers are prevented from actually receiving their guaranteed refund by insisting that Accounting Services approve refunds (with request updated inaccurately as 'dispute paid'). It is then sent to Customer Service to issue the refund, but they are prevented from making the refund by systems which won't issue refunds for deliveries which are 'on time' (even if the delivery time is falsified).

USPS OIG Refuses to Report Federal Crimes to DoJ

Apparent Illegal Orders to Keep DoJ Out of Delivery Problems

I made several complaints to the USPS OIG about falsified government records (which is a federal crime) to include the delivery time and 'dispute paid' records. In every case the complaint was consistently referred to USPS local management as USPS OIG does not consider 'delivery or tracking problems'. USPS closed each such complaint with no action taken.

I then made several complaints to USPS IG and USPS BoG as the USPS IG is required by statute to report all federal crimes to the DoJ (which has the exclusive authority and mission to 'uphold the law'). A senior lawyer in USPS OIG finally answered that USPS OIG had decided that 'delivery and tracking' problems should not be prosecuted.

I also complained to USPS BoG about the USPS IG failure to follow the statutory mandate to report all federal crimes (as she reports to USPS BoG) and they referred the matter CIGIE which took no action on the matter.

I am a graduate of West Point and was trained in illegal orders, their nature, their dangers, and how to resist them. It is apparent that USPS BoG has verbally informed the USPS IG that if she wants to keep her job she must insure that DoJ does not get involved in delivery or tracking problems (and of course there are no records of any such illegal order).

My problems getting the authorized refund can be directly attributed to the USPS OIG failure to follow the statutory requirement to report all federal crimes to the DoJ. Had the DoJ been notified in 2017 of 1.9 million falsified delivery records as required, DoJ would have been required to 'uphold the law' and insist that the recommended changes be implemented.

This cause of action is also described in more detail to include statutes and case law in my affirmation USPScnt1-2.pdf in ECF 34-1.

Count 3 and 4, DoS Denies Non Immigrant Visas Without Due Process

Denied Visa Applications Basis For Properly Stated Claim

DoS incorrectly denied my wife's visa application in 2018 and Mrs. Von Kramer's three visa applications in 2019 which required my wife and Mrs. Kramer to apply again in 2022 when DoS granted the requested visas.

The improper delays caused various harms to us, but the easily measured damages supporting these claims is the cost of later visa applications and airline ticket refund fees. The relief sought for these costs are credits for future services with DoS. This is the essence of the claim against DoS.

There is also the ancillary relief of a court declaration that the three visa denials for Mrs. Von Kramer improperly prevented her from establishing her five years of 'lawful presence' in 2019, 2020 and 2021 while she was good health and able to travel easily in order to receive Social Security surviving spouse benefits while residing in Thailand.

Visa Applications Denied Improperly

In short 5 to 10 minute interviews DoS did not permit my wife or Mrs. Von Kramer to present the extensive evidence I had helped them prepare. The four written decisions were effectively identical and contradicted the different verbal decisions. The written decisions were form letters which cited the INA 214(b) statute and restated the requirements of the statute (e.g. 'you did not prove you would not overstay your visit to the U.S..') but included no references to the actual evidence which was reviewed to support the determination.

Due Process basically requires that the U.S. government provide a fair hearing before it can restrict a person's right to life, liberty or property. It is well established that the right to travel freely (e.g. visas) is a Due Process liberty so a fair hearing was required by DoS. It can be argued that DoS failed to provide for most, if not all, of the required elements of Due Process. However, our Complaint focuses on the requirement for a proper written decision.

Due Process requires a written decision which cites the underlying law to support the decision (e.g. INA 214(b)) as well as a discussion of the evidence which was reviewed and the findings based on the evidence. The written decision denying the

2018 and 2019 visa applications failed this requirement.

The federal crime of falsification of government records[4] is broad and includes the failure to include required facts in the record[5]. This is particularly relevant as courts have held that the inclusion of the evidence considered is required to support the denial of a visa of a citizen spouse. Further, the interviews were almost certainly recorded and the verbal justification for the denial contradicted the written record. One or both records must be false.

Faulty Denials Constitutes Federal Crimes

While Due Process is a fundamental constitutional requirement which is mandated for all federal employees and agents, it is important to note that the faulty written denials of the visa applications were also a federal crimes. This is the foundation of the claim against DoS OIG which has special reporting requirements for federal crimes (but not necessarily constitutional violations).

USATXN Challenges to Count 3 and 4 Improper

USATXN makes extensive faulty challenges to these DoS claims to include the offensive (to us) 'Doctrine of Consular Non Reviewability' (DoCNR) and these challenges are discussed in detail in my attached affirmation, DoScnt3-4-5.pdf, ECF 34-2 as well as my Response of 18 Mar 2024 (ECF 18) pages 13 through 23.

Current DoS Visa Processing Antiquated and Ineffective

Recent democratic developed countries such as Germany all have much more

4 18 USC Section 1001

5 This requirement was central to overturning a visa denial by DoS in Sandra Munoz v. State Department (9th Cir. 2022, 21-55365)

effective visa processing procedures which also have built in Due Process. At roughly half the cost they have substantially lower false positives (visas granted where visitor overstays visa) as well as significantly lower false negatives (overall visa denial percentage is much lower).

They do this through thorough (even tedious) requirements for supporting documentation such as precise dates of arrival and departure, confirmed flight reservations, confirmed lodging reservations, and verified funds to cover expenses for the entire stay. They rely on private international companies to collect, review, and verify the initial paperwork. The German consular staff reserve the right to require additional paperwork and actual interviews for those applications of interest but this is very rare as one would expect for routine tourist visas.

In less developed countries like Thailand, the U.S. visa program is known for being distinctly unfair, simply a matter of luck. The average person has little idea what to do to get a tourist visa, just try again and hope you get a friendly interviewer. There are also those who know how to game the system and reliably get tourist visas but that likely entails some form of corruption (knowing the right person in the consulate who will direct the application to a 'friendly' / corrupt interviewer). This is to be expected when the 'guardrails' of fair hearings and due process are removed and it is left exclusively to individual discretion.

Conclusion

The court is asked to provide the requested credit for future services with DoS. In addition the court is asked to direct DoS to work with DoS OIG and DoJ in revising their visa application processes to fully conform with the constitutional

requirements of Due Process.

Count 5, DoS OIG Only Refers Visa Denial Complaints to DoS

DoS OIG Does Not Report Federal Crimes to DoJ

I reported the lack of Due Process and false / contradictory records to DoS OIG in early October of 2018 but they referred the matter to the Bureau of Consular Affairs (BCA), an agency in DoS, without reporting the matter to DoJ.

In 2018, I did not explicitly cite the false records as a federal crime or the OIG mandate to report federal crimes to DoJ. However, properly trained DoS OIG staff should be able to recognize plausible allegations of federal crimes and their mandate to report such crimes to DoJ. CIGIE is separately asked to correct any such defects in OIG training.

Had the DoS OIG correctly reported the complaint to the DoJ and had DoJ correctly monitored the response by BCA to insure future compliance to the constitution and criminal statutes, my wife would have been provided with her non immigrant visa in 2018 or 2019 and the second application in 2022 would have been unnecessary. DoJ is separately asked to correct processing of plausible allegations of federal crimes to insure that plausible allegations of federal crimes are monitored to insure future compliance and appropriate redress to past victims.

USATXN Challenges to Count 5 Unfounded

USATXN makes broad non-specific challenges to these DoS OIG claims. These

challenges are discussed in detail in my attached affirmation, DoScnt3-4-5.pdf, ECF 34-2.

It is important to note that the offensive (to us) DoCNR applies only to judicial review and, if DoCNR is found valid at all and not overturned in its entirety, DoCNR only increases the need for supervision of DoS OIG, CIGIE and DoJ as the task of insuring compliance with individual constitutional rights and criminal statutes is left exclusively to the executive branch, which in this case is DoS OIG and DoJ.

Conclusion

The court is asked to direct the DoS OIG to report all plausible allegations of federal crimes to DoJ and work with DoS, CIGIE, and DoJ to revise visa processing of visa applications to conform with the constitutional requirements of Due Process.

Count 7, USCIS Ignores Clear Mandates Protecting Applicants

Mrs. Carr Left Stranded in Thailand[6]

My wife was initially issued a two year 'conditional' green card as we had not been married for two years when we applied for her immigration visa. The intent was that after two years USCIS would review / interview to insure that we had a legitimate marriage, not a fake marriage for immigration purposes.

Up to 90 days before the expiration of the two year 'green card' we were allowed (required?) to submit an I-751 application to convert the 'conditional' green card

6 This is the first cause of action with USCIS.

into a normal ten year card. Within a few days of when I was permitted to submit the I-751, I submitted the I-751 and it was accepted.

According to clear and unambiguous statutes, USCIS then had 90 days to either schedule an interview or, if they didn't have staff / resources to conduct the interview, then USCIS must waive the interview and approve or deny the I-751 application based on the extensive documentation we had provided (joint tax returns, lease, etc.).

However, when USCIS sent us the acceptance notice for the I-751, they sent an 18 month extension letter with no indication of then the interview would be. As the 18th month approached they sent a 24 month extension letter (ECF 18-6) which expired in Nov of 2022 when my wife was in Thailand on an emergency trip as her mother had died while she was on her way to see her mother one last time.

Here again USCIS failed to comply with clear and specific statutes which required USCIS to provide my wife with documentation of her permanent resident status until her I-751 was decided. I contacted USCIS and asked them what to do and they said they couldn't do anything until my wife was back in the U.S., but she couldn't return as airlines would not permit her to return with an expired green card.

USCIS suggested we go to the local consulate and get a 'lost' documents letter for $575 to allow us to return. Instead, we made a last minute application for a non immigrant visa for my wife for $160 which we were able to get a few days before our scheduled return date (DoS had previously improperly denied just such a visa

in 2018, see Count 3).

Being stranded in Thailand resulted in a lot of confusion, stress and extra travel to the consulate (not local) the value of which are hard to measure, but there was the simple cost of the $160 non immigrant visa fee which I attribute half to DoS for improperly denying our first application in 2018 and half to USCIS. As before, we asking for a credit for future services with USCIS.

Mrs. Carr was Left In Dire Circumstances[7]

Mrs. Carr an Apparent Undocumented Alien (a.k.a. an 'illegal')

Mrs. Carr Unlawfully Denied the Privileges of Citizenship

Even though USCIS informed us on 31 Jan 2023 (over a year ago) that her I-751 application (for a ten year green card) and N-400 application (for citizenship) were both approved (ECF 10-5)[8] and she only needed to take the Oath of Allegiance to become a citizen, the reality is that at this time she has not been permitted to take the Oath of Allegiance to become a citizen and has been left as an apparent 'undocumented alien' (a.k.a. an 'illegal').

All previous USCIS documents of lawful permanent resident status have expired

7 This is the second cause of action with USCIS. There is a separate Motion for Partial Summary Judgment Outstanding (MfPSJ) for this cause of action and relief in ECF 33 on 15 May 2024.

8 IECF 10-5 is a scanned image of a somewhat dog eared original and the text is fine print that can be hard to read. The USCIS decision of 30 Jan 2023 in ECF 10-5 stated:

We have approved your I-751, Petition to Remove Conditions on Residence. Our records also indicate we have approved your Form N-400 Application for Naturalization. Because we also approved your N-400, you will not receive a new Permanent Resident Card (also known as a Green Card). Instead, once you have taken the Oath of Allegiance, you will receive a Certificate of Naturalization, which will be proof of your U.S. citizenship.

(ECF 24-1, 18-6, 20-2), and, contrary to law, having been unlawfully denied a ten year 'green card'[9] she has suffered realistic fears of being deported at any time by ICE (she doesn't trust U.S. immigration), vigilantes (under Texas SB4), or National Guardsmen (on day one to deport millions of illegals who are poisoning the blood of our nation).

In addition, for over a year Mrs. Carr has been deprived of the rights of citizenship which were authorized in the USCIS decision of 31 Jan 2023 (ECF 10-5) which includes the right to vote but also to assist her eldest son in seeking better employment (Thailand is still suffering from the effects of Covid restrictions).

Relief Sought

The relief sought is a ten year green card as soon as possible which will remain in effect until my wife can get a U.S. passport from DoS (which can take an extended period where my wife would not have her Certificate of Naturalization or any other proof of her legal status).

In addition, the court is asked to direct USCIS to allow my wife to take the Oath of Allegiance as soon as possible and provide her with the Certificate of Naturalization as promised over a year ago.

There is no direct compensation possible for the loss of the rights of citizenship, but in this case my wife has family members who are expected to apply for

9 INA 264 is 8 USC section 1304 which in (d) states:
(d) Certificate of alien registration or alien receipt card
Every alien in the United States who has been registered and fingerprinted under the provisions of the Alien Registration Act, 1940, or under the provisions of this chapter shall be issued a certificate of alien registration or an alien registration receipt card...

immigration shortly after my wife is a citizen. Their queue position could be advanced double the time my wife's citizenship was delayed as their applications were delayed that same amount and they could get earlier immigration as compensation for my wife's loss of the rights of citizenship.

Ancillary Relief Sought

It should also be noted that it appears that it is not 'uncommon' for USCIS to put applicants in such dire circumstances (see ECF 29 para 186) and there could well be dozens or even thousands of other USCIS applicants who require prompt assistance. The court could speed the determination of the number of similar applicants by requesting prompt resolution of existing delayed FOIA requests as described in ECF 34-3, USCIScnt7-8.pdf, page 5.

As ancillary relief we are seeking a review of USCIS procedures by USCIS, DHS OIG, and DoJ to insure that they comply with lawful statutes as well as other provisions of Due Process.

Conclusion

There are two distinct claims against USCIS and the court is asked to provide the direct relief sought as well as the ancillary relief as there are indications that there may be dozens or even thousands of USCIS applicants in similar dire circumstances.

There is a more formal statement of this claim in ECF 34-3, USCIScnt7-8.pdf, my affirmation which includes the relevant statutes and case law and refutes the

unfounded non-specific claims of sovereign immunity, executive discretion, and failure to state a claim by USATXN.

Count 8, DHS OIG Does Not Insure USCIS Obeys Statutory Mandates

Numerous Complaints to DHS OIG Went Unheard

I made numerous complaints to DHS OIG concerning violations by USCIS with no apparent response. Had DHS OIG fulfilled its statutory mandate to insure that USCIS fulfilled its statutory mandates and Due Process, my wife would not have been stranded in Thailand and would have been a citizen for over two years and her close family members would have been well into the queue for their own immigration visas.

On that basis, we are seeking a review of USCIS procedures by USCIS, DHS OIG, and DoJ to insure that they comply with lawful statutes as well as other provisions of Due Process.

There is a more formal statement of this claim in ECF 34-3, USCIScnt7-8.pdf, my affirmation which includes the relevant statutes and case law and refutes the unfounded non-specific claims of sovereign immunity, executive discretion, and failure to state a claim by USATXN.

Count 6, CIGIE Overlooks Failure to Report Crimes to DoJ

The various federal IG's serve a critical role in monitoring federal agencies with independence to identify and correct deficiencies. The IG's have a clear and specific requirement to report crimes to the DoJ. The DoJ has the sole authority

and responsibility to uphold the constitution and the law. It just wouldn't work to have multiple agencies with ambiguous authority and responsibility in that crucial area.

Indeed, many agencies have a requirement that all federal crimes must be promptly reported to the IG. In turn, the IG's are responsible to promptly report such crimes to the DoJ.

However, it seems that there is a danger that the OIG can get too comfortable working with their monitored agencies and lose their independence. They will promptly work with local management to resolve rogue staff, but have difficulty correcting systemic problems where the corrections would be highly disruptive to the monitored agency.

The CIGIE was created to foster professionalism and integrity across all the various OIGs but the council itself is composed predominantly of different IGs. It seems that too many IGs have already gotten too comfortable with working with their monitored agency to the point of ignoring their fundamental mandate to report crimes to the DoJ; this mandate has come to be considered optional and up to the discretion of the individual IG.

This is apparent as the two cases where IG's had specifically refused to forward reports of federal crimes to the DoJ which were reported to the CIGIE were not viewed as serious matters which required correction.

While I reported to CIGIE federal crimes which I had previously reported to USPS

OIG and DoS OiG and which were not forwarded to DoJ, CIGIE took no action. Had the CIGIE instead insisted that the crimes be reported to the DoJ and had the DoJ monitored the response to insure that appropriate corrections were made to prevent future violations and provide appropriate redress for victims, it is likely that this case would not have been necessary.

Conclusion

This court is asked to clarify the role of CIGIE to the IG mandate to report all federal crimes to DoJ. That must be a central mandate for all IG's and OIG staff.

There should also be training on illegal orders and how they can be and should be resisted. CIGIE should also be encouraged to provide special whistleblower protection for IG and OIG staff who receive ambiguous verbal orders which amount to orders to not report federal crimes to DoJ (as in USPS BoG apparent order to USPS IG to keep DoJ out of delivery and tracking problems).

There is a more complete explanation of this claim in ECF 34-4, CIGIEdojCnt6-9.pdf which lists the appropriate statutes and case law.

Count 9, DoJ Does Not Refer and Monitor Reports of Federal Crimes

As DoJ is the sole executive agency with the authority and responsibility to uphold the law, DoJ has a constitutional mandate to uphold all lawful statutes and lawful court decisions. There is no executive discretion to ignore particular statutes or court decisions, but, of course, in the face of ambiguous or conflicting statutes, the DoJ has option of (and should) deferring discretion to the agency with

responsibility for implementing the statutes (as the courts do).

The DoJ does have wide discretion as to how to uphold the law. With limited resources (as with all agencies), DoJ can refer matters to the appropriate OIG or local management or whoever it chooses and monitor the results as long as DoJ insures that there is future compliance to the law. This is particularly true with allegations of federal crimes which, by definition, Congress has decided that no federal agent should ever commit such acts.

This requirement that DoJ monitor the resolution of all federal crimes and violations of individual constitutional rights (while referring as necessary and appropriate) is explained in detail in my affirmation in ECF 34-4, CIGIEdojCnt6-9.pdf.

However, to summarize, DoJ was notified of each Count 1 through 8 (not 9, the DoJ count) prior to this suit. The first USPS referral was over a year ago. Had DoJ promptly addressed the concerns prior to this suit, this suit would not have been necessary and DoJ could have referred the matters to the appropriate OIG and agency and monitored the result without the intervention of this court.

This court is asked to direct the DoJ to interface with the appropriate OIGs (and CIGIE) and the monitored agencies to correct the separate defects identified in the previous counts.

Sanctions

It appears that the latest Defendants' Motion to Dismiss (ECF 31, 14 May 2024) is

completely without merit as was the previous such motion (ECF 15, 08 Mar 2024). As such, the court is asked to consider issuing an Order to Show Cause for Sanctions under FRCP 11(b) and (c) on its own initiative.

There is a pending Motion for Sanctions (ECF 30, 9 May 2024) for the needless delays caused by Mr. Padis prior to the substitution of counsel. In the instant case, the court is asked to consider creative sanctions such as community service and early filings as the normal sanctions of 'costs' does not really work with pro se or government parties.

Ms. Owen is also asked to voluntarily withdraw the latest Defendants' Motion to Dismiss (ECF 31, 14 May 2024) in its entirety under FRCP 216(c) within 21 days. If Ms. Owen does not then I will consider filing a Motion for Sanctions as the current Motion to Dismiss has served no purpose other than to delay and waste the time of the court and the Plaintiffs.

Conclusion

The court is asked dismiss the second Defendants' Motion to Dismiss (ECF 30, 14 May 2024) in its entirety and initiate sanctions as described above.

Respectfully submitted,

Verification of Response

I, the undersigned Plaintiff, hereby affirm under penalty of perjury in both the United States and Thailand that as an individual:

1. I have reviewed the above response and believe all of the allegations to be true to the best of my knowledge.
2. I have reviewed the associated documents and exhibits and believe them to be true and accurate copies with the exception of the documents identified as being redacted. The redacted documents have only been altered to remove sensitive personal information or other redactable information (as cited in the redaction) according to normal redaction procedures.

I hereby reaffirm that the above is true to the best of my knowledge under penalty of perjury in both the United States and Thailand.

/s *Brian P. Carr*

_____

Brian P. Carr
1201 Brady Dr
Irving, TX 75061
Date: 28 May 2024
Location: Irving, Texas

CERTIFICATE OF SERVICE

On the recorded date of submission, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I also hereby certify that on this same date no copies were served via U.S. mail as all parties in this matter were enrolled in the court's electronic case filing (and service) system.

/s *Brian P. Carr*

_____

Brian P. Carr
1201 Brady Dr
Irving, TX 75061

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

Brian P. Carr, Rueangrong Carr, and Buakhao Von Kramer Plaintiffs versus United States, US Department of Justice, USPS, USPS OIG, USPS BoG, US CIGIE, Department of State, Department of State OIG, USCIS, DHS OIG, and SSA Defendants	Civil No. 3-23CV2875 - S Affirmation Supporting Count 1 and 2 Against USPS and USPS OIG

Affirmation Supporting Count 1 and 2

Against USPS and USPS OIG

USPS Count 1

Promised Refund Never Received

The basis for the claim against USPS is that I was promised a refund to my credit card for $26.35 but the refund never posted to my credit card.

39 USC Postal Services authorizes USPS to offer services such as 'click-n-ship' and 'guaranteed delivery' which, under certain circumstances, requires USPS to refund the cost of the service to the originating credit card. Those circumstances occurred according to USPS but USPS never followed through with the actual refund to my credit card.

While this court does, it seems, have jurisdiction under 39 USC to order USPS to

actually refund $26.35 to my credit card[1], out of an abundance of caution, the relief I am seeking is a credit for future services of $26.35 which is authorized in Marbury v. Madison (1803) and APA 5 USC § 702. The restrictions on 'sovereign immunity' are discussed at length in my Response of 18 Mar 2024 (ECF 18) pages 1 to 4 and won't be repeated here.

While USPS' failure to make the promised credit to my credit card justifies the claim against USPS, more details are required to support the ancillary claims against USPS OIG and USPS Board of Governors (BoG) as well as (later and separately) CIGIE and DoJ.

Delivery Time Falsified to be On Time When Actually Late

On 09 Apr 2021 I purchased an Overnight Express, Guaranteed Delivery 'click-n-ship' shipping label to return my passport from the Thai Embassy in D.C. to my home in Irving, TX (see ECF 18-3 USPS Receipt for $26.35) which I sent via email to the Thai Embassy as the pending trip to Thailand required the passport and visa be returned promptly (to complete other arrangements).

The Thai Embassy returned my passport with the package accepted by USPS at

1 While USATXN incorrectly claims 'sovereign immunity' citing Dolan v. Postal Service, 546 U.S. 481 (2006), it appears that USATXN did not actually read this decision as it clearly states that 'sovereign immunity' does not apply in this case. In Dolan, the court held that 'sovereign immunity' had been waived under the FTCA due to specificity of section 2680(b) which permitted tort claims including, according to the court, negligent acts claims such as careless driving and, apparently, inappropriate placement of delivered packages.

Dolan did declare that tort claims for late delivery would not be supported by the FTCA exemption for 'sovereign immunity' as 'losses of the type for which immunity is retained under section 2680(b) are at least to some degree avoidable or compensable through postal registration and insurance.'

I did indeed purchase the insurance described in Dolan through 'guaranteed delivery' providing minimal compensation ($26.35) for minimal inconvenience in this case.

8:46PM on 13 April 2021 with guaranteed delivery by 12PM on 15 April 2021.

However, the package did not arrive at the Irving Post Office until 11:18 AM 15 April 2021 and was 'out for delivery' at 11:29 AM. It was scanned as delivered at 11:35 while the driver was almost certainly still at the Post Office, a common practice for improper 'Stop the Clock' scans (as will be discussed later) as can be seen in ECF 18-4.

That morning I was home waiting for delivery so that I could complete the arrangements for the trip and I got an email from USPS saying the envelope had been delivered at 11:35AM. I went out and looked for the envelope, but couldn't find it. I called the Post Office as I was concerned that my passport had been delivered to the wrong address (not being familiar with improper 'Stop the Clock' scans) and was told not worry as there were equipment / truck problems and the driver was running late. That made no sense to me at the time as I was not familiar with improper 'stop the clock' scans where delivery times are falsified by scanning the package as delivered while still at the Post Office.

I took pictures of the porch area and checked again at 12PM with my wife and we still could not find the envelope / package. Needless to say I was concerned that my passport was lost (a very serious matter) and we would have to cancel our trip.

I checked again at 12:30PM and found the envelope in our mail box. I was relieved and was able to complete the arrangements for our trip. The delay was a minor inconvenience but the terms of the 'guaranteed delivery' only supported minor compensation, $26.35.

Refund Failed Due to Falsified Records and Broken Business Processes

That afternoon I made an online request for a refund (refund request number 6006595) which was denied in minutes as the package was falsely reported as delivered on time. Two weeks later I was permitted to appeal that arbitrary denial and on 5 May 2021 the status of the refund was changed to 'Dispute Paid', see ECF 18-8.

However, the credit card which I used for the online 'click-n-ship' never posted the refund (I check each credit card statement each month confirming all charges and credits).

Over fifty years of credit card use, I have been promised hundreds of credit card refunds and there have been dozens of cases where the refund doesn't get to my credit card. In that case, I contact the merchant and ask for the transaction ID where they paid my bank. In every other case the merchant gets back to me and says there was a problem initiating the refund at their end and they then issue a credit which does post to my credit card.

With USPS when I asked for a transaction ID for the refund, I received assurances that the refund was paid, but no one could give me any details such as the credit card transaction ID (see ECF 18-9). From my numerous phone calls to USPS I concluded that while 'Accounting Services' approved the refund on 5 May 2021 (incorrectly recorded as 'dispute paid') they then referred the matter to Customer Service who were unable to make the refund due to the delay and the fact that

USPS records still indicated that the package was delivered on time.

Ancillary Relief Sought From USPS

As I suffered a loss (albeit minimal) from the widespread falsified delivery times and refund processing by USPS, ancillary relief is sought to reduce future falsified delivery times and incorrectly denied refunds. There are also several suggestions for measures which could provide redress for past and future harmed postal customers as well as offsetting the cost of the measures through penalties for USPS management who benefited from illegally increased bonuses, but the actual implementation of this remediation should be left to DoJ and USPS OIG coordinating with USPS.

Count 2, USPS OIG and USPS BoG

Ancillary Relief is sought from USPS OIG and USPS BoG because had they fulfilled their statutory and constitutional duties then I would have received the authorized refund and this matter would not be before the court. The relief sought is orders to USPS OIG and USPS BoG that they take those actions to prevent such damages in the future, particularly 5a USC IG Act 1978 section 4 (reporting of federal crimes) as it relates to 18 USC § 1001, the federal crime of falsification of government records.

Obviously Sovereign Immunity does not apply to these orders to obey statutes as in Marbury v. Madison (1803) and APA 5 USC § 702. The limitations on 'sovereign immunity' are discussed at length in my Response of 18 Mar 2024 (ECF 18) pages

1 to 4

USPS OIG has long known that USPS has serious problems with falsified delivery times and other customer complaints related to delivery and tracking problems (e.g. refund for late deliveries with guaranteed delivery times) but rather than reporting federal crimes to the DoJ (as required by statute) and aggressively pursuing corrections, USPS OIG only made suggestions to USPS management which USPS management chose not to implement (never allocated resources for the corrections). This is not surprising as USPS employees and management benefited from the falsified records with better retention, promotions, and, for management, bonuses. These problems are discussed more thoroughly in my Response of 18 Mar 2024 (ECF 18) pages 47 to 49.

I asked the USPS IG to report federal crimes to DoJ (as required by statute) in the hopes that the DoJ would insist that USPS management rein in the rampant falsified records, but the USPS IG answered indirectly that the OIG had decided not to prosecute the widespread federal crimes (see ECF 10-1). This is clearly outside of USPS IG executive discretion. The decision to prosecute is exclusively reserved to DoJ, presumably so that DoJ can use the threat of prosecution to efficiently insure future compliance with the law. Committing federal crimes and violating the constitution is never within executive discretion as discussed in My Response of 18 Mar 2024 (ECF 18) pages 4 to 6.

As USPS IG was clearly violating statutory mandates to report federal crimes to the DoJ, I asked that the USPS IG 'supervisor', the USPS BoG in this case, direct the USPS IG to report federal crimes to the DoJ (see ECF 10-2), but they referred

my request to CIGIE where the USPS IG was a significant leader (see ECF 10-3). This was not surprising as USPS BoG also benefits from the reported superior (but false) quality measurements and (fraudulent) profitability from the widespread falsified records. The apparent illegal orders by USPS BoG are discussed in my Response of 18 Mar 2024 (ECF 18) pages 8 to 12.

Conclusion

The claims against USPS, USPS OIG, and USPS BoG are well founded and the court is asked to direct DoJ, USPS OIG, USPS, and USPS BoG to coordinate the corrections to these widespread and long term problems. I should also be given a credit for future services as requested though, admittedly, I am actually more interested in good governance than in the $26.35.

Mr. Carr hereby affirms under penalty of perjury in both the United States and Thailand that as an individual:

1. I have reviewed the above affirmation and believe all of the statements to be true to the best of my knowledge.
2. I have reviewed the associated documents and exhibits and believe them to be true and accurate copies with the exception of the documents identified as being redacted. The redacted documents have only been altered to remove sensitive personal information or other redactable information (as cited in the redaction) according to normal redaction procedures.

I hereby reaffirm that the above is true to the best of my knowledge under penalty of perjury in both the United States and Thailand.

/s Brian P. Carr

_____

Brian P. Carr
1201 Brady Dr

Irving, TX 75061

Date: 21 May 2024

Location: Irving, Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

Brian P. Carr, Rueangrong Carr, and Buakhao Von Kramer Plaintiffs versus United States, US Department of Justice, USPS, USPS OIG, USPS BoG, US CIGIE, Department of State, Department of State OIG, USCIS, DHS OIG, and SSA Defendants	Civil No. 3-23CV2875 - S Affirmation Supporting Count 3, 4 and 5 Against DoS and DHS OIG

Affirmation Supporting Count 3, 4 and 5

Against DoS and DHS OIG

DoS Count 3 and 4

Non Immigrant Visas Denied Without Due Process

In 2018 and 2019 Mrs. Carr and Mrs. Von Kramer were denied non-immigration visas under INA 214(b) (actually 8 USC § 1184(b)) but the written decision was flawed as it listed the statute for the denial but had no references to the evidence considered. This is a clear violation of Due Process and the Plaintiffs were damaged by the unwarranted restrictions in their freedom of travel.

As non-immigration visas are issued and denied according to clear and specific statutes (not discretionary) and visa applications are processed on a fee for service basis, the primary relief they seek is credits for future services with DoS.

There is ancillary relief of a declaration of the court that Mrs. Von Kramer was improperly denied the ability to visit the United States in 2019, 2020 and 2021 in order to establish her Social Security 'lawful presence' to receive Social Security Surviving Spouse.

There is also ancillary relief to correct the defects in non-immigration visa processing to insure that it complies with constitutional requirements such as Due Process as well as relief for similar applicants.

Sovereign Immunity and Executive Discretion Do Not Apply

The primary releif sought is a credit for future services which is authorized in Marbury v. Madison (1803) and APA 5 USC § 702. The restrictions on 'sovereign immunity' are discussed at length in my Response of 18 Mar 2024 (ECF 18) pages 1 to 4 and won't be repeated here.

Further, contrary to the broad claims of executive discretion by USATXN, it is not applicable as committing federal crimes and violating the constitution is never within executive discretion as discussed in my Response of 18 Mar 2024 (ECF 18) pages 4 to 6.

Doctrine of Consular Non Reviewability (DoCNR) Challenged

We intend to challenge DoCNR as it is offensive (to us) and fundamentally flawed. With a Motion to Dismiss, it is premature to dismiss a case while there are novel and untested challenges to existing law.

The Complaint has two claims against DoS for failure to provide Due Process in their 4 visa denials to Mrs. Carr (2018) and Mrs. Von Kramer (2019). USATXN claims immunity from DoCNR citing Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) an older case.

Since that time there have been a few challenges raised to DoCNR to include Sandra Munoz v. State Department (case no. 21-55365) (9th Cir. 2022) where the citizen spouse of a foreign national met the exception described in Kleindienst.

As such, DoCNR does not apply to my wife as I am her citizen spouse who clearly desires to travel with her and, hence, must be given Due Process in administrative decisions impacting my ability to travel with her.

For Mrs. Von Kramer, in Patel v. Reno, 134 F.3d 929, 121 F.3d 1277 (9th Cir. 1997) the APA is cited as a potential source of judicial review. As Nikolaus Von Kramer (Mrs. Von Kramer decesased husband) was a pre-1968 veteran, Congress has made special provisions preserving Mrs. Von Kramer's Social Security Surviving Spouse benefits and she is an ideal candidate to challenge DoCNR with respect to the APA as suggested in Patel.

Patel v. Reno, 134 F.3d 929, 121 F.3d 1277 (9th Cir. 1997) states:

> judicial review exists when the government has denied a visa if the government did not act "on the basis of a facially legitimate and bona fide reason." Kleindienst v. Mandel, 408 U.S. 753 (1972). In addition, ... judicial review may also exist under certain circumstances pursuant to the

Administrative Procedure Act.

We also intend to challenge the DoCNR as it was an outgrowth of the Chinese Exclusion Act of 1882 which has been repealed and replaced with the INA which has no such exclusion of judicial review. The only restriction on consular visa review is in INA, 8 USC § 1104(a) - Powers and duties of Secretary of State which only restricts the Secretary of State and makes no mention of the courts or judicial review so it appears that Congress has repealed the DoCNR.

Finally, we intend to challenge DoCNR directly based on the fact that the DoCNR is based on a false premise. While Congress can certainly deprive citizens, permanent residents, and 'aliens' from life, liberty, and property, it can only do so through Due Process. Congress never had any 'plenary power to exclude aliens' because the authors of the Fifth Amendment declared 'No person ... ' and Mrs. Von Kramer is a person. They could well have said 'No citizen ...' which was used elsewhere in the constitution but they chose 'person' for the protections of the Fifth Amendment and so Mrs. Von Kramer must be provided with Due Process.

The discussion of DoCNR is elaborated in depth in our Response (ECF 18) pages 13 - 22 where we document the current exceptions to DoCNR and our intent to challenge DoCNR, but the foundation of those novel and untested challenges were already laid out in the complaint (ECF 11-1) para 121 and 167.

Just as Plessy v. Ferguson, 163 U.S. 537 (1896) was based on a false creation of the Supreme Court, 'Separate But Equal', which was corrected with Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), the 'Doctrine of Consular Non

Reviewability' (DoCNR) is based on a false premise that aliens are not people but rather some sort of vermin who are not entitled to Due Process. DoCNR needs to be overturned are relegated to the trash bin of history.

Conclusion

We should be granted the relief sought from DoS as DoS had a duty to provide facially correct decisions (listing the evidence considered as well as the statute) in its visa denials and it did not. Sovereign Immunity does not apply. The offensive (to us) DoCNR does not apply to my wife and Mrs. Von Kramer has several plausible challenges to DoCNR which we intend to pursue.

We are also seeking ancillary relief of DoS revising the non immigrant visa process to insure it complies with Due Process as required by the Fifth Amendment. This is actually greater importance to us than the nominal credit for future services as we have a strong belief in good governance. We also seek relief for other surviving spouses of American workers who are being unlawfully denied access to their congressionally approved benefits.

Count 5, DoS OIG Refuses to Investigate or Report Federal Crimes

Ancillary Relief is sought from DoS OIG because had they fulfilled their statutory and constitutional duties in 2018 with Mrs. Carr's improper visa denial, in 2019 Mrs. Von Kramer's first visa would have been granted and the later applications would not have been necessary. Further, as there are expiration dates for the non-immigrant visas provided to my wife and Mrs. Von Kramer (they are of the ten year multiple entry variety), we will likely need to get replacement visas and have

an interest in a corrected visa application process.

The relief sought is orders to DoS OIG that they take those actions to prevent such damages in the future, particularly 5a USC IG Act 1978 section 4 (reporting of federal crimes) as it relates to 18 USC § 1001, the federal crime of falsification of government records.

Obviously Sovereign Immunity does not apply to these orders to obey statutes as in Marbury v. Madison (1803) and APA 5 USC § 702. The limitations on 'sovereign immunity' are discussed at length in my Response of 18 Mar 2024 (ECF 18) pages 1 to 4. Further, contrary to the broad claims of executive discretion by USATXN, it is not applicable as committing federal crimes and violating the constitution is never within executive discretion as discussed in my Response of 18 Mar 2024 (ECF 18) pages 4 to 6.

Further, the DoCNR applies only to judicial review and there is no restriction on OIG review of consular visa decisions and process.

Conclusion

The claims against DoS and DoS OIG are well founded and the court is asked to direct DoJ, DoS OIG and DoS to coordinate the corrections to provide Due Process in processing all visa applications. We should also be given a credit for future services as requested though, admittedly, we are actually more interested in good governance than in the credits for future services.

Mr. Carr hereby affirms under penalty of perjury in both the United States and Thailand that as an individual:

1. I have reviewed the above affirmation and believe all of the statements to be true to the best of my knowledge.
2. I have reviewed the associated documents and exhibits and believe them to be true and accurate copies with the exception of the documents identified as being redacted. The redacted documents have only been altered to remove sensitive personal information or other redactable information (as cited in the redaction) according to normal redaction procedures.

I hereby reaffirm that the above is true to the best of my knowledge under penalty of perjury in both the United States and Thailand.

/s Brian P. Carr

_____

Brian P. Carr
1201 Brady Dr

Irving, TX 75061

Date: 26 May 2024

Location: Irving, Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

Brian P. Carr, Rueangrong Carr, and Buakhao Von Kramer Plaintiffs versus United States, US Department of Justice, USPS, USPS OIG, USPS BoG, US CIGIE, Department of State, Department of State OIG, USCIS, DHS OIG, and SSA Defendants	Civil No. 3-23CV2875 - S Affirmation Supporting Count 7 and 8 Against USCIS and DHS OIG

Affirmation Supporting Count 7 and 8

Against USCIS and DHS OIG

USCIS Count 7

Mrs. Carr Unlawfully Stranded In Thailand

In 2020, USCIS unlawfully refused to adjudicate Mrs. Carr's I-751 application for 10 a ten year 'green card' within 90 days as required in 8 CFR 216.4(b)(1)[1] (see ECF 29, para 147). Further, in 2022 USCIS allowed the unlawful 2 year extension of her 2 year 'green card' to expire and left Mrs. Carr stranded in Thailand even though 8 CFR 216.4 requires USCIS to automatically extend her current 'green card' until the I-751 has been adjudicated.[2] See ECF 29 para 151 to 153.

1 8 CFR 216.4(b)(1) states:
... The [USCIS] director must either waive the requirement for an interview and adjudicate the petition or arrange for an interview within 90 days of the date on which the petition was properly filed.

2 8 CFR 216.4 states
... Upon receipt of a properly filed Form I-751, the alien's conditional permanent resident status shall be extended automatically, if necessary, until such time as the director [of USCIS] has adjudicated the petition.,

As a result Mrs. Carr had to apply for a second time for a non immigration visa from DoS on an emergency basis. Half of the cost of this application is attributed to USCIS. However, instead of seeking any payment, Mrs. Carr is seeking a credit for $80 for future services with USCIS. This is a paltry sum considering the distress of being stranded in Thailand and having to make emergency visa interviews and travel reservations.

However, the primary relief is corrections in USCIS procedures requiring them to actually follow the statutes and provide Due Process in all their dealings with applicants. Good governance is of immeasurable value in and of itself.

Sovereign Immunity and Executive Discretion Do Not Apply

USATXN makes broad claims of sovereign immunity but as the relief sought is a credit for future services the relief sought is authorized in Marbury v. Madison (1803) and APA 5 USC § 702. The restrictions on 'sovereign immunity' are discussed at length in my Response of 18 Mar 2024 (ECF 18) pages 1 to 4 and won't be repeated here.

USATXN also makes broad claims of executive discretion without associating it with any specific Count. However, it is clear that violating the constitutional rights of individuals is never within executive discretion and so does not apply to this claim. Executive Discretion is discussed at length in my Response of 18 Mar 2024 (ECF 18) pages 4 to 6.

Mrs. Carr is in Dire Circumstances

Mrs. Carr is an Apparent Undocumented Alien (a.k.a. an 'illegal')

Mrs. Carr Unlawfully Denied the Privileges of Citizenship

Even though USCIS informed Mrs. Carr on 31 Jan **2023** (over a year ago) that her I-751 application (for a ten year green card) and N-400 application (for citizenship) were both approved (ECF 10-5[3]) and she only needed to take the Oath of Allegiance to become a citizen, the reality is that at this time she has not been permitted to take the Oath of Allegiance to become a citizen and is an apparent 'undocumented alien' (a.k.a. an 'illegal').

All USCIS documents of her lawful permanent resident status have expired (ECF 24-1, 18-6, 20-2), and, contrary to law[4], with no ten year 'green card' she has realistic fears of being deported at any time by ICE (she doesn't trust U.S. immigration), vigilantes (under Texas SB4), or National Guardsmen (on day one to deport millions of illegals who are poisoning the blood of our nation).

In addition, for over a year Mrs. Carr has been deprived of the rights of citizenship which were authorized in the USCIS decision of 31 Jan 2023 (ECF 10-5) which includes the right to vote but also to assist her eldest son in seeking better employment (Thailand is still suffering from the effects of Covid restrictions).

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3 ECF 10-5 is a scanned image of a somewhat dog eared original and the text is fine print that can be hard to read. The USCIS decision of 30 Jan 2023 in ECF 10-5 stated:

We have approved your I-751, Petition to Remove Conditions on Residence. Our records also indicate we have approved your Form N-400 Application for Naturalization. Because we also approved your N-400, you will not receive a new Permanent Resident Card (also known as a Green Card). Instead, once you have taken the Oath of Allegiance, you will receive a Certificate of Naturalization, which will be proof of your U.S. citizenship.

4 INA 264 is 8 USC § 1304 which in (d) states:

(d) Certificate of alien registration or alien receipt card

Every alien in the United States who has been registered and fingerprinted under the provisions of the Alien Registration Act, 1940, or under the provisions of this chapter shall be issued a certificate of alien registration or an alien registration receipt card...

USATXN Attempts Delays, Never Mentions This USCIS Decision

I raised this issue in ECF 33, Plaintiff's Motion for Partial Summary Judgment where the merits of this claim are discussed in detail, but it is important to call out that on 1 Mar 2024 Mr. Padis apparently attempted to trick the Plaintiffs into giving Defendants almost 60 days extension by lying about there being no records of service and pretending that he had no access to the Complaint and Summons (see email thread in ECF 28-1), but Mr. Carr saw through that ruse and on 3 Mar 2023, Mr. Carr informed Mr. Padis of the plight of Mrs. Carr and provided Mr. Padis with a copy of the critical USCIS decision of 31 Jan 2023 (ECF 10-5).

Instead of providing some expeditious relief to Mrs. Carr, Mr. Padis instead filed the meritless Motion to Dismiss on 8 Mar 2024 (ECF 15) which served no effect other than 66 days of delay. It is also important to note that while Mr. Carr has constantly reminded Defendants and the Court of the critical USCIS decision of 31 Jan 2023 (ECF 10-5), at no time have the Defendants mentioned that decision in any of their pleadings. While omitting critical facts may make it easier to claim that a cause of action has no standing, it does not actually make it true. Such blatantly false and misleading pleadings should warrant sanctions for the Defendants' recent Motion to Dismiss (ECF 31).[5]

Relief Sought

Mrs. Carr seeks her ten year 'green card' in accordance with INA 264(d) as soon as possible so that she will no longer be an apparent 'undocumented alien' or an 'illegal'.

5 FRCP Rule 11 (c)(3) states:
On the Court's Initiative. On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

Mrs. Carr also seeks her Certificate of Naturalization as soon as possible in accordance with INA 337(a)[6] and 8 CFR 337.2[7].

In addition to the nominal credit for future services, we are seeking credit for the time my wife was denied her privileges of citizenship for my wife's family members, but doubled as their applications were delayed (direct compensation) and in compensation for loss of citizenship privileges for my wife (as the right to vote otherwise has no compensation). See ECF 29, Relief 19 to 22.

It should also be noted that it appears that it is not 'uncommon' for USCIS to put applicants in such dire circumstances (see ECF 29 para 186) and there could well be dozens or even thousands of other USCIS applicants who require prompt assistance. On 12 Dec 2023, I submitted FOIA requests to USCIS for cumulative N-400 data (ECF 16-6) and cumulative I-751 data (ECF 16-7) which should indicate if there are dozens or even thousands of similar applicants. In ECF 13-4 the statuses of these FOIA requests are in process (being worked on) as of 10 Feb 2024.[8] If the court was interested in the number of USCIS applicants in similar circumstances, the court could order on its own initiative for these now delayed

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6 INA 337 which is 8 USC § 1448 states:
(d) Rules and regulations
The Attorney General shall prescribe rules and procedures to ensure that the ceremonies conducted by the Attorney General for the administration of oaths of allegiance under this section are public, conducted frequently and at regular intervals, and are in keeping with the dignity of the occasion.

7 8 CFR 337 states:
337.2 Oath administered by USCIS or EOIR.
(a) Public ceremony. An applicant for naturalization ... must appear in person in a public ceremony.... Such ceremony will be held at a time and place designated by USCIS.... Naturalization ceremonies will be conducted at regular intervals as frequently as necessary to ensure timely naturalization, but in all events at least once monthly where it is required to minimize unreasonable delays.

8 From my over ten years experience as a data analyst (and DB administrator) these are actually quite straightforward queries and shouldn't take more than 8 hours for a competent analyst familiar with the DB tables and indices.

FOIA requests to be fulfilled within thirty days. [9]

Because of the extensive violations of Due Process in USCIS procedures, there are also several suggestions for measures which could provide redress for past and future harmed USCIS applicants, but the actual implementation of this remediation should be left to DoJ and DHS OIG coordinating with USCIS.

Sovereign Immunity and Executive Discretion Do Not Apply

USATXN makes broad claims of sovereign immunity but as the relief sought is simply Orders directing USCIS to fulfill its statutorily mandated duties, the relief sought is authorized in Marbury v. Madison (1803) and APA 5 USC § section 702. The restrictions on 'sovereign immunity' are discussed at length in my Response of 18 Mar 2024 (ECF 18) pages 1 to 4 and won't be repeated here.

USATXN also makes broad claims of executive discretion without associating it with any specific Count. However, it is clear that violating the constitutional rights of individuals and that ignoring unambiguous statutory mandates is never within executive discretion and so does not apply to this claim. Executive Discretion is discussed at length in my Response of 18 Mar 2024 (ECF 18) pages 4 to 6.

Conclusion

We should be granted the relief sought from USCIS as it is clear that USCIS has failed to fulfill statutorily mandated requirements as well as violating Due Process in numerous ways.

9 5 USC § 552 (C) describes the options available to the court with delayed FOIA requests such as these.

We are also seeking ancillary relief of USCIS revising its I-751 and N-400 procedures to insure it complies with existing statutes and Due Process as required by the Fifth Amendment. As my wife has close family members who are expected to apply to USCIS for immigration visas and, potentially citizenship, the corrected procedures are of great importance, more than the nominal credit for future services.

Count 8 DHS OIG Fails to Report and Correct Crimes and Due Process Violations

Ancillary relief is sought from DHS OIG for the damages we suffered as a result of USCIS inaction. DHS OIG is required to monitor USCIS and insure that USCIS does not commit federal crimes or infringe on individual constitutional rights, 5a USC IG Act 1978. We made complaints to DHS OIG as seen in ECF 29 paragraphs 141, 156, 190, 192. 193, and 217. While it is possible that the announcement of the new 48 month extension letter on 23 Jan 2023 was a result of the prior complaint to DHS OIG, the response was too little and too late. No such letter was ever provided to my wife with the result that she is now an apparent undocumented alien (a.k.a. an illegal).

Had DHS OIG insured that USCIS fulfilled the requirements of 8 CFR 216.4(b)(1), INA 337 which is 8 USC § 1448, INA 264 which is 8 USC § 1304 and Fifth Amendment Due Process, my wife would not have been stranded in Thailand and would have been a citizen for over two years and her close family members would have been well into the queue for their own immigration visas.

Sovereign Immunity and Executive Discretion Do Not Apply

The relief sought is orders to DHS OIG that they take those actions to prevent such damages in the future, particularly 5a USC IG Act 1978 section 4 (reporting of federal crimes) as it relates to 18 U.S. Code Section 1001, the federal crime of falsification of government records. Obviously Sovereign Immunity does not apply to these orders to obey statutes as in Marbury v. Madison (1803) and APA 5 USC § section 702. The limitations on 'sovereign immunity' are discussed at length in my Response of 18 Mar 2024 (ECF 18) pages 1 to 4.

Further, contrary to the broad claims of executive discretion by USATXN, it is not applicable as committing federal crimes and violating the constitution are never within executive discretion as discussed in my Response of 18 Mar 2024 (ECF 18) pages 4 to 6.

Conclusion

Of primary concern is that my wife get her ten year ‘green card’ as promptly as possible. In addition, she should be allowed to take the ‘Oath of Allegiance’ and given her Certificate of Naturalization.

The claims against USCIS and DHS OIG are well founded and the court is asked to direct DoJ, DHS OIG and USCIS to coordinate the corrections to provide Due Process in processing all USCIS applications.

We should also be given a credit for future services as requested though, admittedly, we are actually more interested in good governance than in the credits

for future services.

Mr. Carr hereby affirms under penalty of perjury in both the United States and Thailand that as an individual:

1. I have reviewed the above affirmation and believe all of the statements to be true to the best of my knowledge.
2. I have reviewed the associated documents and exhibits and believe them to be true and accurate copies with the exception of the documents identified as being redacted. The redacted documents have only been altered to remove sensitive personal information or other redactable information (as cited in the redaction) according to normal redaction procedures.

I hereby reaffirm that the above is true to the best of my knowledge under penalty of perjury in both the United States and Thailand.

/s Brian P. Carr

_____

Brian P. Carr
1201 Brady Dr

Irving, TX 75061

Date: 21 May 2024

Location: Irving, Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

Brian P. Carr, Rueangrong Carr, and Buakhao Von Kramer Plaintiffs versus United States, US Department of Justice, USPS, USPS OIG, USPS BoG, US CIGIE, Department of State, Department of State OIG, USCIS, DHS OIG, and SSA Defendants	Civil No. 3-23CV2875 - S Affirmation Supporting Count 6 and 9 Against CIGIE and DoJ

Affirmation Supporting Count 6 and 9[1] Against CIGIE and DoJ

CIGIE Count 6

CIGIE Bound By Statutes Requiring Reporting of Federal Crimes

Each IG member of CIGIE is bound by the requirement to report federal crimes to DoJ as previously cited in 5a USC IG Act 1978 as well as the CIGIE charter in 5a USC IG Act 1978 § 11 which requires the council to 'continually identify, review, and discuss areas of weakness and vulnerability in Federal programs and operations with respect to fraud, waste, and abuse'[2] as well as an Integrity

1 ECF 29 is the First Amended Verified Complaint which includes a typographical error in that there are two Count 8's and no Count 9. A Second Amended Verified Complaint is being prepared which corrects such typographical and clerical errors. Count 9 is on Page 44 just before paragraph 247.

2 5a U.S.C. IG Act 1978 § 11 states:
(c) Functions and Duties of Council. -
(1) In general. - The Council shall -
(A) continually identify, review, and discuss areas of weakness and vulnerability in Federal programs and operations with respect to fraud, waste, and abuse; …
(B) in consultation with the Office of Special Counsel and Whistleblower Protection Coordinators from the member offices of the Inspector General, develop best practices for coordination and communication in promoting the timely and appropriate handling and consideration of protected disclosures, allegations of reprisal, and general matters regarding the implementation and administration of whistleblower protection laws, in accordance with Federal law.

Committee which 'shall receive, review, and refer for investigation allegations of wrongdoing that are made against Inspectors General and staff members.'

As all IG's and OIG staff members are required to report all federal crimes to DoJ (a clear and unambiguous mandate) the failure to report such crimes is clearly 'wrongdoing' (as well as a potential crime of obstruction of justice) and so must be referred for correction which CIGIE did not do.

IG's are not permitted to simply look away when plausible allegations of federal crimes are reported to them. In the two cases which were brought to CIGIE attention with USPS IG and DoS IG, the CIGIE took no action to correct their failure to report federal crimes to DoJ and we suffered the damages cited in Counts 1, 3, and 4.

In contrast, had the CIGIE since its inception actively insisted that each IG and OIG report crimes to the DoJ and DoJ had done its job of insuring future compliance with federal criminal statutes and eliminating future violations of individual constitutional rights, none of the damages would have occurred.

For example, had the USPS OIG 2017 audit (see ECF 18-7 DR-AR-18-001) been reported to DoJ as 1.9 million federal crimes of falsifying government records and had DoJ done its job of insuring the suggested corrections were implemented, then the USPS problems with falsified documents and broken business processes would almost certainly not have led to the claim for a credit for future services of $26.35

(d) Integrity Committee. - (1) Establishment. -
The Council shall have an Integrity Committee, which shall receive, review, and refer for investigation allegations of wrongdoing that are made against Inspectors General and staff members of the various Offices of Inspector General described under paragraph (4)(C).

in 2021.

The relief sought from CIGIE is simply that they insure that in the future IG and OIG staff report federal crimes to DoJ as required by statute.

The widespread falsification of delivery times and other records in USPS must be curtailed. Similarly, the widespread lack of due process in visa denials and the intrinsic ommission of required information (the evidence considered in the denial) must be corrected.

CIGIE is asked to participate with DoJ, USPS OIG, DoS OIG, and DHS OIG in the process of putting in place procedures to resolve the problems in USPS, DoS, and USCIS as well as other problem areas.

The dangers of illegal orders and widespread falsified records is discusssed in my Response of 18 Mar 2024 (ECF 18) pages 36 to 40 and the Afghan Fiasco. My standing in that particular matter is tenuous at best but the solutions proposed herein addresses much wider concerns. It is hoped that by adopting the principles of good governance not only can future fiascos be avoided, but we also develop senior Military Service Officers (MSOs) who could refuse orders to use Seal Team Six to assasinate federal judges or federal attorneys and, if necessary, collude to insure that any commander which orders such heinous crimes is held accountable for those crimes. That is only possible with strong support of the appropriate IGs, DoJ, and courts.

Sovereign Immunity and Executive Discretion Do Not Apply

The primary relief sought is strict adherence to foundational statutes and mandates as supported in Marbury v. Madison (1803) and APA 5 USC § 702. The restrictions on 'sovereign immunity' are discussed at length in my Response of 18 Mar 2024 (ECF 18) pages 1 to 4 and won't be repeated here.

Further, contrary to the broad claims of executive discretion by USATXN, it is not applicable here as the relief sought is simply a mandate that IG and OIG staff members be required to report federal crimes to DoJ as dictated in clear and unambiguous statutes. Executive discretion is discussed at length in my Response of 18 Mar 2024 (ECF 18) pages 4 to 6.

Conclusion

The court is asked to direct that CIGIE adapt its training and review standards to insure that all IG's and OIG staff report all federal crimes to DoJ. CIGIE is also asked to work with DoJ and relevant OIG's and their monitored agencies to insure future compliance with federal criminal statutes and individual constitutional rights.

Count 9, DoJ Must Monitor Allegations of Federal Crimes

DoJ Can Refer Reported Allegations

The DoJ is given broad and exclusive powers to enforce the law, both the constitution and lawful congressional statutes in 28 USC Part II - Department Of Justice. The DoJ has adopted its own mission statement with 'The mission of the Department of Justice is to uphold the rule of law, to keep our country safe, and to

protect civil rights.' [3]

Congress and the courts have wisely given the DoJ sole authority and responsibility to 'uphold the law' to include prosecution as necessary. It simply would not work to have multiple agencies with ambiguous responsibilities to 'uphold the law' and prosecute federal crimes.

However, that authority and responsibility to 'uphold the law' comes with a price. The constitution has three branches of government with Congress, the Courts, and the Executive branch. As the sole executive agency with authority and responsibility to 'uphold the law', DoJ is required to uphold all lawful statutes and court decisions.

This is not to say DoJ has no executive discretion. When faced with ambiguous or contradictory statutes, the DoJ can grant each agency executive discretion to choose the best solution for following the law just as the courts do in such situations. Of course, this never extends to violating clearly stated and unambiguous mandates of Congress such as federal crimes (which are never an option for a federal agency) or violating the Constitution, particularly individual rights guaranteed by the constitution.

That said, the DoJ still has significant executive discretion in how to 'uphold the law'. The DoJ has to exist within the same budgetary constraints as any other

3 These is also an expanded mission statement with:
The mission of the Department of Justice is to enforce the law and defend the interests of the United States according to the law, to ensure public safety against foreign and domestic threats, to provide Federal leadership in preventing and controlling crime, to seek just punishment for those guilty of unlawful behavior, and to ensure the fair and impartial administration of justice for all Americans. In carrying out its mission, the Department is guided by four core values: (1) equal justice under the law; (2) honesty and integrity; (3) commitment to excellence; and (4) respect for the worth and dignity of each human being.

agency. The DoJ has the authority to refer matters to other agencies such as the relevant OIG and even local management as long as DoJ monitors the results to insure that future violations are eliminated, thereby upholding the law.

The DoJ can also use the threat of prosecution as necessary to get recalcitrant individuals or agencies to comply, offering immunity for testimony (to quickly get to serious crimes) and plea deals as necessary and appropriate.

However, executive discretion for DoJ does not extend to ignoring lawful statutes or court decisions. The relief sought does not violate DoJ executive discretion as the requested orders simply require the DoJ to 'uphold the law' in whatever fashion it finds most expedient.

Sovereign Immunity Does Not Apply

The primary relief sought is for DoJ to enforce the law as in its mission and charter which is supported in Marbury v. Madison (1803) and APA 5 USC § 702. The restrictions on 'sovereign immunity' are discussed at length in my Response of 18 Mar 2024 (ECF 18) pages 1 to 4 and won't be repeated here.

Conclusion

The court is asked to direct CIGIE and DoJ to work with USPS OIG, DoS OIG, and DHS OIG as well as their monitored agencies (USPS, DoS, and USCIS) to avoid future violations of criminal statutes and individual constitutional rights. Further, whenever CIGIE and / or DoJ become aware of other federal crimes (e.g.

falsified readiness reports for Afghan government units) then they are asked to diligently pursue all violations to insure a culture of falsified records or other crimes do not become ingrained in the agency under consideration.

Mr. Carr hereby affirms under penalty of perjury in both the United States and Thailand that as an individual:

1. I have reviewed the above affirmation and believe all of the statements to be true to the best of my knowledge.
2. I have reviewed the associated documents and exhibits and believe them to be true and accurate copies with the exception of the documents identified as being redacted. The redacted documents have only been altered to remove sensitive personal information or other redactable information (as cited in the redaction) according to normal redaction procedures.

I hereby reaffirm that the above is true to the best of my knowledge under penalty of perjury in both the United States and Thailand.

/s Brian P. Carr

_____

Brian P. Carr
1201 Brady Dr

Irving, TX 75061

Date: 27 May 2024

Location: Irving, Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

Brian P. Carr, Rueangrong Carr, and Buakhao Von Kramer Plaintiffs versus United States, US Department of Justice, USPS, USPS OIG, USPS BoG, US CIGIE, Department of State, Department of State OIG, USCIS, DHS OIG, and SSA Defendants	Civil No. 3-23CV2875 - S Affirmation Demonstrating USATXN Misleading Summaries Justify False Conclusions

Affirmation Demonstrating
USATXN Misleading Summaries Justify False Conclusions

USATXN summarizes by selectively including minor details which were included for context only and completely omitting the important and relevant facts. When just citing minor details is not enough to mislead the court, USATXN even gets the unimportant details wrong causing further confusion. These misleading restatements are then used to reach false conclusions.

I have broken the summaries of USATXN into sections adjusting their external references to be consistent and clear. After each USATXN I have made an accurate summary of the same claims to demonstrate how unimportant details are cited while important statements are omitted.

USATXN Misstates Department of State Claim

USATXN states:

> Plaintiff Brian Carr is a U.S. Citizen who married Plaintiff Rueangrong Carr in Thailand and petitioned, as her spouse, for her to receive lawful-permanent-resident status in the United States (commonly known as a green card), which was expedited and approved within four months' time. (ECF 29 para 60, 74).
>
> Plaintiff Von Kramer is Mrs. Carr's sister, and in 2019, she desired to travel to the United States. (ECF 29 para 4, 89, 90). But her request for a non-immigrant tourist visa was initially denied; however, her fourth application for a visa was granted in 2022 (about three years later). (ECF 29 para 90, 110, 113). Plaintiffs allege they complained to the State Department's Office of Inspector General (OIG) about the challenges Von Kramer encountered in attempting to obtain a visa, but the OIG refused to report or investigate allegations of (what Plaintiffs allege constituted) federal crimes. (ECF para 125-34).

I would instead summarize this claim with:

> Mr. Carr, a U.S. citizen, married Mrs. Carr in Thailand in 2018 and applied for an immigration visa. On learning that there was an expected one year delay for his wife's visa and his mother likely would not survive until then, he applied for non immigration visa ($160 fee) so that his wife could meet his mother. This visa application was denied without Due Process with a form letter citing INA 214(b) but no reference to the evidence considered. Mr. Carr complained to the DoS OIG of the denial without Due Process but the matter was referred to BCA which took no action to correct the deficiency.
>
> Mrs. Von Kramer in 2019 applied three times for a non-immigrant visa so that she could receive her Social Security Surviving Spouse benefits but they were all denied with the same form letter and no Due Process.
>
> In 2022 Mrs. Carr was unlawfully stranded in Thailand by USCIS and she and Mrs. Von Kramer applied for non-immigrant visas which were granted allowing Mrs. Von Kramer to start receiving Social Security benefits.

USATXN Misstates USCIS Claim

USATXN states:

> In 2022, Plaintiff Rueangrong Carr applied for naturalization. ECF 29 para 204. At her scheduled naturalization interview, she initially was unable to write a sentence in English and failed the government and history (civics) portions of the naturalization test. ECF 29 She was then scheduled for another interview to retake those portions of the naturalization test, but she did not show up - resulting in the denial of her naturalization application. ECF 29 It appears that Mr. and Mrs. Carr had a previously scheduled international vacation that conflicted with the scheduled interview, ECF 29 para 194, but their request to reschedule the interview was denied, ECF 29 para 197.

I would instead summarize this claim with:

> In 2020 Mrs. Carr submitted the mandatory I-751 application for a ten year green card but it was unlawfully delayed with an extension that expired in 2022. In 2022 she also submitted an N-400 application for citizenship. On 31 Jan 2023 USCIS notified her that both her I-751 and N-400 were approved (ECF 10-5) but USCIS unlawfully did not provide her with a 10 year green card or schedule the Oath of Allegiance for her to become a citizen. USCIS has unlawfully left her as an apparent 'undocumented alien' (a.k.a. an 'illegal') at a time when there is pending Texas SB4 for vigilantes to deport just such 'illegals' without Due Process. USCIS is also unlawfully denying Mrs. Carr her rights as a U.S. citizen.

USATXN Misstates USPS Claim

USATXN states:

> In addition, Mr. Carr in 2021 purchased overnight shipping from the USPS to deliver his passport from the Thai Embassy in Washington, D.C. to his home in Irving, Texas. (ECF 29 para 27). The package allegedly arrived a day late, and now Mr. Carr wants a credit with the USPS. (ECF 29 para 3, 27) Mr. Carr complained to his Congressman, who allegedly had been informed that a refund had been paid. ECF 29 para 35-38. Plaintiffs now complain that the USPS official who reported the refund to Mr. Carr's Congressmen had been misled by "numerous falsified documents." ECF 29 para 39.

I would instead summarize this claim with:

> In 2021 Mr. Carr purchased a 'click-n-ship' label with 'Guaranteed Delivery' for, in this case, 12 noon on 15 Apr 2021. The package arrived a few minutes late entitling him to a refund to his credit card of $26.35, but the driver had improperly scanned the package as delivered at 11:35am while the driver was still at the Post Office, an extraordinarily common problem (USPS OIG 2017 audit, ECF 18-7). The falsified delivery time delayed Mr. Carr's application for a refund and may have contributed to the fact that while the appeal showed 'Dispute Paid' no credit has ever posted to his account.

USATXN Misstates Ancillary Relief

USATXN states:

> Plaintiffs allegedly notified various government agencies including the U.S. Department of Justice about the circumstances of their challenges in obtaining a visa for Plaintiff Von Kramer, naturalization for Mrs. Carr, and timely delivery (or a refund) of a package for Mr. Carr. See, e.g., ECF 29 para 248-53. But to date, the federal government has not taken (in Plaintiffs' view) appropriate or timely action to correct allegedly inaccurate records and fix supposedly broken systems (such as USCIS's automated phone system). See, e.g., id. at 49-53, para 27-47 ("USCIS must immediately disable hang ups by the automated phone system and instead fail over to a human representative.").

I would instead summarize this claim with:

> As each of the primary agencies, USPS, DoS, and USCIS have plausibly falsified government records, Mr. Carr has complained to USPS OIG, USPS BoG, DoS OIG, DHS OIG, and CIGIE about these federal crimes and asked that the plausible allegations of federal crimes be reported to the DoJ as mandated in the IG Act of 1978. It appears that none of complaints were forwarded to the DoJ and when they were reported directly to DoJ, DoJ did not fulfill its mandate to 'uphold the law'. For plausible allegations of federal crimes this minimally requires the DoJ to refer the matter another party and monitor the result to insure that future violations do not occur and the injured parties get appropriate redress when possible.

Conclusion

USATXN also added the incorrect adverb of 'allegedly' in numerous locations but as the Amended Complaint is Verified it should have been 'affirmed under penalty of perjury'. To call such statements allegations is false.

It is clear that USATXN selected minor details which were included in the Complaint for context and omitted the central facts in order to mislead the court. USATXN has been aware of the critical USCIS Notice and Decision of 31 Jan 2023 since 3 Mar 2024 when I sent him a copy and informed him of my wife's plight, but at no time has USATXN addressed that certified USCIS document (ECF 10-5) in any pleading to the court.

The USATXN later broad and conclusory claims (lacking any specificity) after this false and misleading summary are themselves false ignoring the critical elements of each claim to reach the false conclusions.

Mr. Carr hereby affirms under penalty of perjury in both the United States and Thailand that as an individual:

1. I have reviewed the above affirmation and believe all of the statements to be true to the best of my knowledge.
2. I have reviewed the associated documents and exhibits and believe them to be true and accurate copies with the exception of the documents identified as being redacted. The redacted documents have only been altered to remove sensitive personal information or other redactable information (as cited in the redaction) according to normal redaction procedures.

I hereby reaffirm that the above is true to the best of my knowledge under penalty of perjury in both the United States and Thailand.

/s Brian P. Carr

_____

Brian P. Carr
1201 Brady Dr

Irving, TX 75061

Date: 27 May 2024

Location: Irving, Texas

Gmail

Brian Carr <carrbp@gmail.com>

OIG Hotline - Customer Receipt Letter, H20190052

1 message

DoS OIG INV (no reply) <noreply@oig.hq.nasa.gov> Tue, Oct 9, 2018 at 1:42 PM
Reply-To: noreply@oig.hq.nasa.gov
To: carrbp@gmail.com

Dear Mr. Brian Carr,

We are writing regarding the complaint that you submitted to the Office of Inspector General for the U.S. Department of State and Broadcasting Board of Governors. We have reviewed your complaint and determined that the appropriate office to address your concerns is the Bureau of Consular Affairs, Executive Office. Your information has been forwarded to that office.

The OIG will take no further action on your complaint. If you have questions, please contact the Bureau of Consular Affairs, Executive Office, using reference number H20190052. We cannot provide telephone numbers or email addresses for the Executive Office, but you may send a letter to:

U.S. Department of State
Bureau of Consular Affairs
Office of the Executive Director
SA-17, 7th Floor
Washington, DC 20522-1707
United States

Thank you for bringing this matter to our attention.

Sincerely,

U.S. Department of State
Office of Inspector General
Hotline Staff

https://www.stateoig.gov/hotline
submitted online Apr 24, 2023

I am writing to report malfeasance within the Department of State (DoS) Office of the Inspector General (OIG) in the form of failure to report federal crimes to the Attorney General as required by statute, see INSPECTOR GENERAL ACT OF 1978 which states in part that the 'Inspector General shall report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law'

Previous complaints were referred to the DoS Bureau of Consular Affairs as well as other agencies but were not reported to the Department of Justice (DoJ). A simple solution to this request is to refer the previous complaints to the DoJ.

This report refers to previous complaints concerning unlawful denial of B1 / B2 visa requests via a form letter that simply stated that the applicant did not prove sufficient ties to their home country without any review of the evidence presented or considered.

These previous complaints were:
H20190052 2018 Rueangrong Carr
H20231753 2023 Buakhao Von Kramer
H20231749 2023 Rueangrong Carr

They were referred to the DoS Bureau of Consular Affairs but not to the DoJ even though they cited the federal crime of falsification of government records.

18 U.S. Code Section 1001 which states in part:
(a) ... whoever, in any matter within the jurisdiction of the executive... branch of the Government of the United States, knowingly and willfully --
(1) falsifies, conceals, or covers up ... a material fact;

This has been held to include the omission of required facts which includes the rationale for a particular visa denial. In all four denied visas, the interviewer made a verbal of explanation of why the visa was denied but this explanation made no sense as it was not supported by the evidence and was not consistent with the published guidelines. This verbal explanation was not included in any form in the written decision.

From
https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=5317&context=penn_law_review
in Judge Henry Friendly's article titled "Some Kind of Hearing"

> "procedures that due process requires....
> ...
> 7. A decision based exclusively on the evidence presented.
> 8. Opportunity to be represented by counsel.
> 9. Requirement that the tribunal prepare a record of the evidence presented.
> 10. Requirement that the tribunal prepare written findings of fact and reasons

for its decision.

As dicussed in the article, the Supreme Court has interpreted the Fifth Amendment due process requirement to cover virtually all administrative procedures which impact a person's life, but with less prohibitive requirements for less significant matters.

Of course it is most unlikely that the DoJ would choose to prosecute such administrative errors. However, as the requirements of due process extend to such a broad range of administrative processes, the DoJ should be brought into the process of updating the administrative procedures to insure that they are revised in a consistent fashion with other administrative procedures and defensible in the event litigation develops. After all, it will be DoJ who needs to defend the procedures in the event of litigation and so the DoJ has a strong interest in insuring the revised procedures are workable as well as complying with the constitutional requirements.

I ask that you confirm receipt of this request and forward this request as well as the three cited complaints to the DoJ. If you forward this request to the DoJ, I ask that you request that the DoJ confirm receipt of the request along with the current status of the request such as 'under consideration' or 'closed, no action taken'. Your attention to this matter is appreciated.

Office of Inspector General
United States Department of State

November 13, 2023

SENT VIA EMAIL TO: carrbp@gmail.com

Brian Carr
1201 Brody Dr.
Irving, TX 75061

Subject: Department of State Office of Inspector General Freedom of Information Act Request No. 2023-P-022 Final Response

Dear Mr. Carr:

This responds to your Freedom of Information Act (FOIA) request to the Department of State (DOS) Office of Inspector General (OIG), dated June 30, 2023, and received on July 3, 2023. Your request sought records pertaining to complaint H20231753. Specifically, your request sought:

1) A copy of complaint number H20231753,
2) an April 25, 2023 complaint with no subject,
3) all records related to yourself, and
4) your passport applications.

In response to your request, we referred item four (4) to DOS - Information Program Services, as detailed in our acknowledgment letter to you dated July 12, 2023. For the remaining three (3) items, we conducted a search within the DOS-OIG Office of Investigations. That search identified eight (8) pages of records responsive to your request. These pages were reviewed by DOS-OIG. We reviewed the responsive records under the FOIA to determine whether they may be disclosed to you. Based on that review, this office is providing the following:

5 page(s) are released in full; and
3 page(s) are released in part.

OIG redacted from the enclosed documents, to protect interagency communications and also third party information to protect the identities and personal identifiable information of individuals. Absent a Privacy Act waiver, the release of such information concerning the third parties named in these records would result in an unwarranted invasion of personal privacy in violation of the FOIA. The responsive records are protected from disclosure pursuant to Exemptions (b)(5), (b)(6) and (b)(7)(C) of the FOIA further discussed below.

Exemption 5, 5 U.S.C. § 552(b)(5)

Exemption (b)(5) of the FOIA protects "inter-agency or intra-agency communications, memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). DOS-OIG is invoking the deliberative process of Exemption (b)(5) to protect information that falls within that privilege's domain.

Exemption 6, 5 U.S.C. § 552(b)(6)

Exemption (b)(6) allows withholding of "personnel and medical files and *similar files* the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). DOS-OIG is invoking Exemption (b)(6) to protect an address, phone number and, the names and email addresses of lower level investigative staff, and any additional information that could reasonably be expected to identify such individuals.

Exemption 7(C), 5 U.S.C. § 552(b)(7)(C)

Exemption (b)(7)(C) protects from public disclosure "records or information compiled for law enforcement purposes . . . [if disclosure] could reasonably be expected to cause an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). DOS-OIG is invoking Exemption (b)(7)(C) to protect the same withheld information detailed above in the explanation of exemption (b)(6).

Fees

Provisions of the FOIA allow us to recover part of the cost of complying with your request. In this instance, because the cost is below the $10 minimum, there is no charge.

Appeals

You have the right to appeal this response. Your appeal must be received within 90 calendar days of the date of this letter. Please address any appeal to:

Appeals Officer
Office of Information Programs and Services (A/GIS/IPS)
U.S. Department of State
2201 C Street NW
Washington, DC 20520
Facsimile: 202-485-1718
Email: FOIAAppeals@state.gov

Both the envelope and letter of appeal should be clearly marked, "Freedom of Information Act/Privacy Act Appeal." Your appeal letter should also clearly identify the DOS-OIG's response.

Additional information on submitting an appeal is set forth in the DOS regulations at 22 C.F.R. § 171.13.

Assistance and Dispute Resolution Services

For further assistance and to discuss any aspect of your request you may contact DOS-OIG's FOIA Public Liaison at:

FOIA Officer
Office of General Counsel
Office of Inspector General
U.S. Department of State
1700 North Moore Street
Suite 1400
Arlington, VA 22209
foia@stateoig.gov

Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Sincerely,

Patrice Jennings

FOIA Specialist

Enclosure: Eight (8) pages of responsive material

OFFICE OF INSPECTOR GENERAL
U.S. Department of State

Hotline Intake
H20231749

OIG Hotline Submission Form

--------- CONFIDENTIALITY ---------

Willing to waive confidentiality: yes

--------- YOUR INFORMATION ---------

Name: Brian Carr

E-mail: carrbp@gmail.com

Phone home: (b)(6); (b)(7)(C)

Phone work:

Address st 1:

City: Irving

State: Texas

Zip: 75061

Country: United States

--------- COMPLAINT INFORMATION ---------

OFFICE OF INSPECTOR GENERAL
U.S. Department of State

Hotline Intake
H20231749

Who is responsible: Chiang Mai Consulate Visa Interviewer

Where did this occur: Chiang Mai Consulate, Thailand

When did this occur: 2018 original incident

How do you know about this: This complaint is an extension of previous OIG requests H20190052 from 2018 which was referred to Bureau of Consular Affairs, Executive Office but no resolution was reached. It is also an extension of a U.S.C.I.S. OIG complaint HLCN1670226793068 submitted on Dec 5, 2022. Copies were also be sent to U.S.C.I.S. Ombudsman and U.S.C.I.S. Director as they were contacted previously.

Follow on HLCN1675735937975 Feb 6, 2023

rest

HLCN1675737014318 Feb 6, 2023

Complaint summary: I have a new cause of action as well as new relief.

U.S.C.I.S. refusal to automatically extend the permanent resident status for my wife, Rueangrong Carr, (as required by statute) prevented her from traveling freely and returning to the U.S.. She needed to apply for a get a B-1 / B-2 visa in order to return to the United States. There was a $160 for this visa.

She received appointment AA00BH32QT at Chiang Mai Consulate on Decemeber 12, 2022 and received the B-1 / B-2 visa on December 13, 2022. This visa allowed Korean Air to provide her transportation back to the U.S. on December 20, 2022.

OFFICE OF INSPECTOR GENERAL
U.S. Department of State

Hotline Intake
H20231749

Rueangrong Carr had applied for this visa in 2018 but it was unlawfully refused making the application in 2022 necessary. The Department of State insists that it is incumbent on the applicant to prove that they have ties to their home country and won't stay beyond the limits of their visa, but also routinely prevents representation to the application, one of the foundations of due process as required by the Fifth Amendment. It is not reasonable to expect that visa applicants for short term visas would have a good understanding of U.S. law and how to present their case.

Further the interviewer clearly explained to my wife that she could not get a tourist visa for short term visits to the U.S. unless she withdrew her immigration application. It is clear that the interviewer was not adequately trained as this requirement to withdraw her immigration application is clearly contrary to law. Further, the interviewer did not provide the rationale for denying my wife's visa application in the written explanation but simply recited the general requirements of the law.

This recitation of the general requirements of the law without the rationale that was applied in this case violates the fifth amendment right to due process which requires that decisions state their rationale rather than just the conclusions (allowing for a meaningful appeal). As such, the failure to include the rationale for a denial constitutes the crime of falsification of government records, intentionally omitting critical information.

I am requesting that all visa denials which do not include the rationale for denial be reviewed by supervisors and corrected, promptly informing the applicant of the rationale for the rejection in writing. Any visa denials which are not corrected in this fashion should be referred to the IG and reported to the Justice Department for any decisions on prosecution.

I am also seeking that U.S.C.I.S. provide a credit for $80 which can be used for future U.S.C.I.S. applications for my family or friends in the future.

I am also seeking that the Department of State similarly provide a credit for $80 which can be used for future visa applications for my family or friends in the future.

Further evidence: Yes

From: (b)(6); (b)(7)(C)
To:
Subject: RE: Hotline No. H20231749
Date: Wednesday, April 19, 2023 9:52:33 AM

UNCLASSIFIED

(b)(6); (b)(7)(C)

Please refer it to CA/EX and also to DHS OIG.

Thanks.
(b)(6); (b)(7)(C)

UNCLASSIFIED

From: (b)(6); (b)(7)(C) @stateoig.gov>
Sent: Wednesday, April 19, 2023 9:42 AM
To: (b)(6); (b)(7)(C) @stateoig.gov>
Subject: Hotline No. H20231749

UNCLASSIFIED

(b)(6); (b)(7)(C) – Per (b)(6); (b)(7)(C) instructions, I am contacting you concerning Hotline No. H20231749. Should this complaint (b)(5)
(b)(5) Thank you in advance for your assistance.

(b)(6); (b)(7)(C)

U.S. Department of State
Office of Inspector General
Office of Investigations
1700 North Moore Street, 9th Floor
Suite (b)(6); (b)(7)(C)
Arlington, VA 22209
Phone: (b)(6); (b)(7)(C)
Cell:
Email: @stateoig.gov

UNCLASSIFIED

From: Hotline
Subject: Additional Submission H20231753

From: Website Alerts <ws-alerts@stateoig.onmicrosoft.com>
Sent: Monday, April 24, 2023 7:22 PM
To: Hotline <hotline@stateoig.gov>
Subject: Webform submission from: Hotline

Submitted on Mon, 04/24/2023 - 19:21

Submitted by Anonymous

Submitted values are:

Do you waive your confidentiality to allow your complaint to be referred?:
Yes

Your Name:
Brian Carr

Your E-mail Address:
carrbp@gmail.com

Your Phone (Home):
518-227-1029

Your Phone (Work):
(b)(6); (b)(7)(C)

Your Phone (Mobile):

Your Address:
(b)(6); (b)(7)(C)
Irving, Texas. 75061
United States

Name and title of the company or individual responsible:
Department of State OIG

Where did this incident occur (office/post/city/state/country)?:
Department of State OIG

When did this incident occur:
19 Apr 2023

How do you know about this incident?:
I am writing to report malfeasance within the Department of State (DoS) Office of the Inspector General (OIG) in the form of failure to report federal crimes to the Attorney General as required by statute, see INSPECTOR GENERAL ACT OF 1978 which states in part that the 'Inspector General shall report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law'

Previous complaints were referred to the DoS Bureau of Consular Affairs as well as other agencies but were not reported to the Department of Justice (DoJ). A simple solution to this request is to refer the previous complaints to the DoJ.

Please summarize what you know about this incident:
This report refers to previous complaints concerning unlawful denial of B1 / B2 visa requests via a form letter that simply stated that the applicant did not prove sufficient ties to their home country without any review of the evidence presented or considered.

These previous complaints were:
H20190052 2018 Rueangrong Carr
H20231753 2023 Buakhao Von Kramer
H20231749 2023 Rueangrong Carr

They were referred to the DoS Bureau of Consular Affairs but not to the DoJ even though they cited the federal crime of falsification of government records.

18 U.S. Code Section 1001 states in part:

(a) ... whoever, in any matter within the jurisdiction of the executive... branch of the Government of the United States, knowingly and willfully --
(1) falsifies, conceals, or covers up ... a material fact;

This has been held to include the omission of required facts which includes the rationale for a particular visa denial. In all four denied visas, the interviewer made a verbal of explanation of why the visa was denied but this explanation made no sense as it was not supported by the evidence and was not consistent with the published guidelines. This verbal explanation was not included in any form in the written decision.

From
https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=5317&context=penn_law_review
in Judge Henry Friendly's article titled "Some Kind of Hearing"

"procedures that due process requires....
...
7. A decision based exclusively on the evidence presented.
8. Opportunity to be represented by counsel.

9. Requirement that the tribunal prepare a record of the evidence presented.
10. Requirement that the tribunal prepare written findings of fact and reasons for its decision.

As discussed in the article, the Supreme Court has interpreted the Fifth Amendment due process requirement to cover virtually all administrative procedures which impact a person's life, but with less prohibitive requirements for less significant matters.

Of course it is most unlikely that the DoJ would choose to prosecute such administrative errors. However, as the requirements of due process extend to such a broad range of administrative processes, the DoJ should be brought into the process of updating the administrative procedures to insure that they are revised in a consistent fashion with other administrative procedures and defensible in the event litigation develops. After all, it will be DoJ who needs to defend the procedures in the event of litigation and so the DoJ has a strong interest in insuring the revised procedures are workable as well as complying with the constitutional requirements.

I ask that you confirm receipt of this request and forward this request as well as the three cited complaints to the DoJ. If you forward this request to the DoJ, I ask that you request that the DoJ confirm receipt of the request along with the current status of the request such as 'under consideration' or 'closed, no action taken'. Your attention to this matter is appreciated.

Brian

Do you have any further evidence of this incident such as documents, photos, e-mails, etc.?:
No

Allegation Certification:
Yes

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BRIAN P. CARR, RUEANGRONG CARR, and BUAKHAO VON KRAMER,

Plaintiffs,

v.

UNITED STATES OF AMERICA; U.S DEPARTMENT OF JUSTICE; UNITED STATES POSTAL SERVICE; UNITED STATES POSTAL SERVICE OFFICE OF INSPECTOR GENERAL; USPS COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY; USPS BOARD OF GOVERNORS; DEPARTMENT OF STATE, OFFICE OF INSPECTOR GENERAL; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICE; DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL; and SOCIAL SECURITY ADMINISTRATION,

Defendants.

Civil Action No. 3:23-CV-02875-S

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR SANCTIONS AND BRIEF IN OPPOSITION

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Introduction and Summary of the Argument

Plaintiffs Brian P. Carr and Rueangrong Carr (husband and wife) together with Mrs. Carr's sister, Buakhao Von Kramer sue Defendants the United States of America and several other federal agencies for allegedly having violated the Due Process Clause of the Fifth Amendment to the U.S. Constitution in relation to their various attempts to obtain immigration benefits. Their complaint included allegations of criminal activity by multiple government agencies and requests court orders mandating that various agencies overhaul their procedures for investigations of crime, adjudication of visa applications, and other government functions. Defendants filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim. Despite the motion since becoming moot due to an amended complaint, Plaintiffs have filed a motion for sanctions, claiming the motion to dismiss was based on a falsified factual basis, legally unsound, and filed for the purpose of delay. Plaintiffs also claim prior counsel for Defendants made false statements in the course of litigation.

Plaintiffs' motion for sanctions is entirely without merit. Defendants' prior counsel did not make any false statements in the course of this litigation. The statements of which Plaintiffs complain are accurate assertions and fair summarizations of Plaintiffs' pleadings. Additionally, Defendants' motion to dismiss is well grounded in both law and fact. Plaintiffs fail to support any of their arguments for sanctions (arguing the now-moot motion to dismiss was meritless when filed) with relevant legal authority. In contrast, Defendants' arguments are well supported, and Defendants were justified to assert their

grounds for dismissal. For these reasons, Plaintiffs' motion for sanctions should be denied.

I. Background

Plaintiffs Brian P. Carr, Rueangrong Carr, and Buakhao Von Kramer filed this lawsuit arising out of their attempts to gain various immigration benefits on December 29, 2023. Plaintiffs attempted to serve process on the United States Attorney on January 9, 2024. (Doc. 10). In doing so, Al-Vincent Joubert, a nonparty, accompanied by Plaintiff Brian Carr, personally served an appropriately[1] designated employee of the United States Attorney's Office for the Northern District of Texas. *Id*. Mr. Joubert also mailed the summons and complaint to "United States Attorney Northern District of Texas." *Id*.

On March 1, 2024, assistant United States attorney George Padis informed Mr. Carr that the United States Attorney did not have a record of proper service[2] and offered to accept service on the U.S. Attorney's behalf. (Doc. 30-4 at 1-2). Mr. Carr responded asserting service had in fact been proper and stating he would oppose any request for an extension to answer unless Defendants would "join in a motion to get Mrs. Carr her approved green card… and her Certificate of Naturalization…" *Id*. at 3-4. AUSA Padis stated Defendants would file a timely response to Plaintiffs' complaint and requested additional details about the manner of service, including who actually handed the

[1] Rule 4(*i*)(A)(i) authorizes service by personal delivery of a summons and the complaint to an assistant United States attorney or an employee "whom the United States attorney designates in a writing filed with the court clerk."
[2] AUSA Padis was under the impression that Plaintiff Carr had delivered the summons and the complaint himself in violation of Rule 4(c)(2), which prescribes that service must be made by a "person who is . . . not a party." As it turned out, Mr. Carr did deliver the summons and the complaint *together* with a process server, which raises an interesting legal question whether such conduct would run afoul of Rule 4(c)(2)'s proscription against service by a party. But that issue has not been, and is not being, raised by Defendants.

summons and complaint to the designated employee of the U.S. Attorney's Office. *Id*. at 4. Mr. Carr responded with the requested details. *Id*. at 5.

On March 8, 2024, Defendants filed a timely motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), asserting Plaintiffs had not met their burden to identify a waiver of sovereign immunity, the Court lacked jurisdiction under various statutes, Plaintiffs' complaint failed to state a claim, and Plaintiffs' complaint was frivolous. (Doc. 8). Defendants chose not to raise any issues regarding service of process. *Id*.

On March 28, 2024, Plaintiffs filed a document entitled "Response to Defendants' Motion to Dismiss" which included a response to the motion to dismiss, a motion to amend the complaint, and a motion for partial summary judgment. (Doc. 18 at 1, 51-52). Counsel for Defendants later conferred with Mr. Carr, informing him Defendants were unopposed to the request to file an amended complaint and such filing would render the Defendants' then-pending motion to dismiss moot. (Doc. 21).

In response to Plaintiffs' motion for partial summary judgment, Defendants filed a motion to deny Plaintiffs' motion for partial summary judgment as premature under Federal Rule of Civil Procedure 56(d). (Doc. 22). On April 22, 2024, the Court entered an order denying Plaintiffs' motion for partial summary judgment as premature, denying Defendants' motion to dismiss as moot, and issuing a schedule for the filing of Plaintiffs' amended complaint and responsive pleadings. (Doc. 26). The parties have since followed the deadlines set out in that order. (*See* Docs. 29 and 31).

On May 9, 2024, Plaintiffs filed a Motion for Sanctions against AUSA Padis, citing Federal Rule of Civil Procedure 11, 28 U.S.C. § 1972, 18 U.S.C. § 1001, 18 U.S.C. § 1621, Local Rule 83.8(b), and Texas Disciplinary Rule of Professional Conduct 4.01. Plaintiffs generally claim he made false statements for the purpose of creating delay and filed a frivolous motion to dismiss.

II. Legal Standards

A. Rule 11 Sanctions

Federal Rule of Civil Procedure 11 allows courts to impose sanctions for frivolous or improper pleadings or motions. Fed. R. Civ. P. 11. The primary determination under Rule 11 is whether the signing individual conducted an inquiry into the factual and legal basis of the challenged document that was objectively reasonable under the circumstances. *See Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 548-51 (1991). "[A] trial court should not impose Rule 11 sanctions for advocacy of a plausible legal theory, particularly where . . . the law is arguably unclear." *See Snow Ingredients, Inc. v. SnoWizard, Inc.*, 833 F.3d 512, 528 (5th Cir. 2016) (alteration in original) (quoting *CJC Holdings, Inc. v. Wright & Lato, Inc.*, 989 F.2d 791, 793 (5th Cir. 1993)).

B. Statutory Authority for Sanctions[3]

Under 28 U.S.C. § 1972, a court may sanction an attorney who multiplies the proceedings in a case unreasonably and vexatiously. 28. U.S.C. § 1972. Section 1972

[3] Plaintiffs cited, 28 U.S.C. § 1972, 18 U.S.C. § 1621, and 18 U.S.C. § 1001 as bases for sanctions. However, 18 U.S.C. §§ 1001 and 1621 are criminal statutes prohibiting false statements made in matters within the jurisdiction of the United States and perjury respectively. These statutes provide no independent authority for a court to issue sanctions in civil matters, and their adjudication is subject to a host of protections and procedural rules afforded to

authorizes courts to require an offending person to pay the excess costs, expenses, and attorneys' fees reasonably incurred due to the sanctionable conduct. An award under this section requires "evidence of bad faith, improper motive, or reckless disregard of the duty owed to the court." *Lawyers Title Ins. Corp. v. Doubletree Partners, L.P.*, 739 F.3d 848, 871 (5th Cir. 2014) (quoting *Cambridge Toxicology Grp.*, *Inc. v. Exnicios*, 495 F.3d 169, 180 (5th Cir. 2007)). These sanctions are "punitive in nature and require clear and convincing evidence that sanctions are justified." *Id.* at 872 (quoting *Bryant v. Military Dep't of Miss.*, 597 F.3d 678, 694 (5th Cir. 2010)). Section 1927 "should be employed 'only in instances evidencing a serious and standard disregard for the orderly process of justice,' lest 'the legitimate zeal of an attorney in representing [a] client [be] dampened.'" *Id*. (quoting *FDIC v. Conner*, 20 F.3d 1376, 1384 (5th Cir. 1991)).

C. Local Rules

A court in the Northern District of Texas may sanction an attorney under Local Rule 83.8(b)(3) for unethical behavior. U.S. Dist. Ct. Rules N.D.T.X., Civil Rule 83.8(b)(3). Unethical behavior is defined as conduct that violates the Texas Disciplinary Rules of Professional Conduct. U.S. Dist. Ct. Rules N.D.T.X., Civil Rule 83.3(e).

Texas Disciplinary Rule of Professional Conduct 4.01 prohibits a lawyer from knowingly making a false statement of material fact or law to a third person. Tex. Disciplinary R. Prof'l Conduct 4.01. Statements of opinion or conjecture do not constitute "material facts" under this Rule. Tex. Disciplinary R. Prof'l Conduct 4.01, cmt. 1. Further,

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criminal defendants and inapplicable to civil litigation. Additionally, as discussed herein, no false statements were made by counsel for Defendants. For that reason, among many others, no criminal statute has been violated, and these statutes are inapplicable.

an attorney only violates this rule if the lawyer knows the statements at issue are false and intends thereby to mislead. Tex. Disciplinary R. Prof'l Conduct 4.01, cmt. 2.

III. Argument and Authorities

Plaintiffs claim counsel for Defendants made multiple false statements and filed a meritless motion to dismiss for the purpose of delay, warranting sanctions. However, AUSA Padis has not made any false statements in the course of this litigation. Additionally, Defendants' motion to dismiss made proper arguments well-grounded in both fact and law. Plaintiffs' legally unsupported arguments that Defendants' various grounds for dismissal were sanctionable are wholly without merit. Therefore, Plaintiffs' motion for sanctions should be denied.

A. Counsel for Defendants never made any false statements in the course of this litigation.

Plaintiffs claim AUSA Padis made multiple "false statements" prior to Defendants appearing in this lawsuit regarding service of process for the purpose of delaying these proceedings. But the statements of which Plaintiffs complain were true. In reality, Plaintiffs have misunderstood legally significant terms and decided the use of those terms must therefore be false.

As an initial matter, neither Rule 11 nor Section 1927 apply to Plaintiffs' complaints of these allegedly false statements. Section 1927 only authorizes courts to award the excess costs, expenses, and attorneys' fees reasonably incurred due to the sanctionable conduct. 28 U.S.C. § 1927. Here, Plaintiffs are expressly not seeking such an award. (Doc. 30 at 2). Instead, Plaintiffs request "creative sanctions" of community

service and early filing requirements. *Id.* This is unavailable under Section 1927. 28 U.S.C. § 1927.

Rule 11 applies only to pleadings, written motions, or other papers presented to a court. *See* Fed. R. Civ. P. 11(b) and (c). Plaintiffs' allegations of false statements occurring in email correspondence between the parties do not fall into this category, and Rule 11 therefore does not apply. *See id.*

Regardless, under any basis for sanctions cited by Plaintiffs, counsel for Defendants never made any sanctionable statement. Plaintiffs claim AUSA Padis made a false statement when he informed Mr. Carr that the U.S. Attorney's Office had no record of being served in the case pursuant to Federal Rule of Civil Procedure 4(i)(1)(A). "Service" is a legal term carrying a particular meaning in a lawsuit, and it has not occurred absent specific procedures being followed. Service may not be achieved by a party to the lawsuit at issue. Fed. R. Civ. P. 4(c)(2). And pursuant to Rule 4(i)(1)(A), to serve the United States and its agencies, a plaintiff must either "deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought" or "send a copy… by registered or certified mail to the civil-process clerk at the United States attorney's office." Fed. R. Civ. P. 4(i)(1)(A). Plaintiffs attempted both methods of service. The attempt to achieve service by mail was ineffective because it was not directed to the correct individual. The summons and complaint were mailed to the United States Attorney for the Northern District of Texas, not to the civil-process clerk as required. (Doc. 10); *See* Fed. R. Civ. P 4(i)(1)(A). Therefore, service was not effectuated by that mailing. *See Jackson v. Ray*, 4:21-cv-

00811-O 2021 WL 4848898, at *3 (N.D. Tex. Sept 23, 2021) (citing *Sun v. U.S.*, 342 F. Supp. 2d 1120, 1124 (N.D. Ga. 2004)) (holding service by mail addressed to United States Attorney ineffective).

Further, the attempt to personally serve was questionable. At the time of sending the initial email complained of, AUSA Padis was under the belief that Plaintiff Brian Carr had personally served process, which would make it ineffective under Rule 4(c). (Doc. 30-4 at 6). Mr. Carr later informed AUSA Padis he was present with a non-party process server at the time of attempted service, and the non-party process server was the person to hand the summons and complaint to an individual in the United States Attorney's Office. *Id.* at 5.

Despite Plaintiffs' assertions to the contrary, AUSA Padis sought to reasonably reduce delay at each turn. When he initially believed all attempts at service were indisputably improper, AUSA Padis offered to accept service on behalf of the United States Attorney for the Northern District of Texas rather than require Plaintiffs to spend additional time and expense achieving service. (Doc. 30-4 at 2). After receiving additional information from Mr. Carr, AUSA Padis again took the path of least delay. Whether a plaintiff being physically present with an appropriate process server at the time of service causes that service to be ineffective presents an interesting legal question—one which Defendants chose not to litigate. Instead, Defendants filed a motion to dismiss within the time allowed assuming service had been effective. (Doc. 15).

These circumstances do not demonstrate "serious and standard disregard for the orderly process of justice" or a lack of reasonable inquiry into the facts at issue. *Cf.*

Lawyers Title Ins. Corp., 739 F.3d at 871; *see also Bus. Guides, Inc.*, 498 U.S. at 548-51. They instead show a reasonable inquiry into the completion of procedural prerequisites and appropriate discretion in determining which legal defenses to pursue. This conduct is therefore not sanctionable.

B. Defendants' motion to dismiss was well-supported by the facts and the law.

Plaintiffs also argue they are entitled to sanctions because, in their view, Defendants' motion to dismiss is without merit. Initially, sanctions are unavailable under either Rule 11 or Section 1927. Additionally, each of Defendants' arguments in their motion to dismiss was legally and factually supported, and Defendants were legally justified to pursue such grounds for dismissal.

1. Rule 11 and Section 1927 sanctions are unavailable.

Plaintiffs' arguments under Rule 11 fail as Plaintiffs have not complied with the safe-harbor provision of that rule. A motion seeking sanctions under Rule 11 must be served on a party at least 21 days prior to be filed with the court. Fed. R. Civ. P. 11(c)(2); *Elliott v. Tilton*, 64 F.3d 213, 216 (5th Cir. 1995). Prior service of the motion is mandatory, and sanctions cannot be granted where a moving party has not complied. *Id*. Further, because the safe harbor is dependent on the ability to withdraw or amend the challenged filing, "a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention)." Fed. R. Civ. P. 11(c) advisory committee's note to 1993 amendment. Here, although the Mr. Carr, AUSA Padis, and the assigned AUSA conferred over the phone for about an hour to discuss Plaintiffs' then-contemplated motion for sanctions in an effort to avoid unnecessary motion practice,

Plaintiffs did not serve the motion for sanctions on Defendants prior to filing.[4] Further, it was not filed until after the Court entered an order dismissing Defendants' motion to dismiss as moot. (*See* Doc. 26). Plaintiffs' request for sanctions under Rule 11 should therefore be denied.

Additionally, Section 1927 is inapplicable to Plaintiffs' request for sanctions with respect to Defendants' motion to dismiss. As discussed in greater detail above, Section 1927 does not authorize the "creative sanctions" Plaintiffs request and is therefore inapplicable. *See supra* p. 6. Nonetheless, under any standard, Defendants' motion to dismiss is not sanctionable for the reasons discussed below.

2. Defendants' citations to unpublished opinions were appropriate and permissible.

Plaintiffs assert that citing cases not designated for publication constitutes "[d]e [f]acto negligence" warranting sanctions. (Doc. 30 at 3). They cite to no authority supporting their position. In fact, the Fifth Circuit specifically allows parties to cite to unpublished opinions. 5th Cir. R. 47.5.4. Although "[a]n unpublished opinion… is not controlling precedent," it "may be persuasive authority." *Butler v. S. Porter*, 999 F.3d 287, 296 n.4 (5th Cir. 2021). Defendants therefore acted appropriately in citing to two unpublished opinions, and sanctions would be improper.

[4] As part of these discussions, Mr. Carr was warned that an unfounded motion for sanctions may itself be grounds for sanctions: "Threats of Rule 11 sanctions are improper where the other side's position is plausible (even if it is incorrect). Seeking sanctions under such circumstances is itself sanctionable conduct." Karen L. Stevenson & James E. Fitzgerald, *Federal Civil procedure Before Trial: National Edition* § 17:71 (2024) (citing *Gaiardo v. Ethyl Corp*., 835 F2d 479, 485 (3rd Cir. 1987)).

3. Defendants' motion to dismiss did not contain any false statements.

Plaintiffs claim Defendants' motion to dismiss contained "false statements" and omissions of "key facts." But the statements and omissions complained of were proper characterizations and summarizations of Plaintiffs' complaint. Plaintiffs filed a 309-paragraph complaint. (Doc. 3). In discussing their arguments for dismissal, Defendants' counsel summarized the relevant allegations in Plaintiffs' complaint—rather than including a word-for-word recitation of every allegation contained therein—and included accurate citations to the referenced portions. For example, the motion to dismiss noted Plaintiffs sought a court order "mandating that various federal agencies including the U.S. Department of Criminal Justice initiate criminal investigations" (Docs. MTD, 30 at 4). This was a characterization of Plaintiffs' request for court orders "[d]irecting USPS OIG, DoS OIG, and DHS OIG to expeditiously investigate all plausible allegations of federal crimes" and "[d]irecting the DoJ to investigate and track all plausible allegations of federal crimes." (Doc. 3 at 45 ¶ 5, 54 ¶ 54). Plaintiffs claim the characterization of these statements as "initiate criminal investigations" amounts to a "false statement." (Doc. 30 at 4).

Defendants and their counsel are unaware of any authority prohibiting attorneys from summarizing an opposing parties' allegations in their own words in a responsive motion. Indeed, to require parties to directly quote opponents' filings in their entirety—no matter how lengthy and inartful—instead of summarizing the portions relevant to an argument would place a strain on judicial resources and unnecessarily duplicate any pleading to which parties filed a response.

Further, Plaintiffs have failed to provide a cognizable argument as to how Plaintiffs' preferred characterizations or the undiscussed "key facts" should result in a different outcome than dismissal. They give detailed explanations of how they feel their claims should have been characterized (*see* Doc. 30, at 4-9), but they provide no legal authority demonstrating how these explanations would overcome Defendants' arguments for dismissal. They certainly have not demonstrated the motion to dismiss was legally or factually frivolous, demonstrated serious and standard disregard for the orderly process of justice, or otherwise constituted unethical behavior.

4. Defendants' jurisdictional arguments were not frivolous.

Defendants' various arguments for lack of subject matter jurisdiction were appropriate and non-frivolous. Plaintiffs claim Defendants' assertion of sovereign immunity is a "false" argument based on *Marbury v. Madison*[5] (5 U.S. 137 (1803)) and the Administrative Procedure Act (APA). (Doc. 30, at 13). Rather than explaining why Defendants' sovereign immunity arguments rise to the level of sanctionable, Plaintiffs refer to their response to Defendants' motion to dismiss. In that response, Plaintiffs provide a narrative history of sovereign immunity, with no citations or support, and claim the APA provides a waiver for their claims. In citing the APA, Plaintiffs appear to argue it provides a sweeping waiver for sovereign immunity in all circumstances where a plaintiff takes issue with agency action and seeks relief other than money damages. (Doc. 18 at 4). But in reality, the limited waiver applies only to "actions against federal

[5] Plaintiffs never explain how this landmark case establishing judicial review gives rise to an unequivocal waiver of sovereign immunity by Congress.

government agencies, seeking nonmonetary relief, if the agency conduct is otherwise subject to judicial review." *Alabama-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 488 (5th Cir. 2014). This limited waiver is subject to significant exceptions. These include, but are not limited to, actions committed to agency discretion or where there is another adequate remedy available to the complaining party. 5 U.S.C. §§ 701(a)(2), 704. And it is a plaintiff's burden to adequately identify an "unequivocal waiver of sovereign immunity. *Freeman v. United States*, 556 F.3d 326, 334 (5th Cir. 2009). As briefed in Defendants' motion to dismiss, Plaintiffs have not met that burden, and the court lacks jurisdiction over their claims under a variety of applicable statutes. (Doc. 15, at 5-6). Their misapplied reliance on the Administrative Procedure Act does not make Defendants' arguments sanctionable.

5. Defendants did not make an "exhaustion of remedies" argument as claimed by Plaintiffs.

Plaintiffs argue Defendants have "misapplied" arguments related to failure to exhaust. Particularly, citing to no authority for this legal assertion, Plaintiffs state "the Exhaustion of Remedies Doctrine" is not "an absolute authority but in fact it is one of many factors to consider." (Doc. 30 at 16). But Defendants never raised any arguments related failure to exhaust. As such, Defendants certainly have not made a frivolous argument in this regard.

6. Defendants appropriately raised Plaintiffs' failure to identify a constitutionally protected liberty or property interest to support their Due Process claims.

Plaintiffs assert Defendants made "completely baseless" challenges to Plaintiffs' Fifth Amendment Due Process claims by treating "the DoS visa denial claims as if they were discretionary." (Doc. 30 at 16). In explanation as to why this challenge is "baseless," Plaintiffs cite to their response to Defendants' motion to dismiss. (Doc. 30 at 16). In that response, Plaintiffs claim the decision to deny a non-immigrant visa is non-discretionary because "Congress has published several statutes governing non-immigrant visas granting DoS authority to issue such visas and, in fact, requiring DoS to issue or deny such visas on a fee for service basis with the criteria for denial specified by statute." (Doc. 18 at 13). However, Plaintiffs fail to identify the statutory scheme to which they refer.[6] In contrast, Defendants cited to a variety of cases demonstrating courts have rejected similar constitutional claims. (*See* Doc. 15 at 7). Plaintiffs have failed to show how this well-supported argument was in any way frivolous, made for some improper purpose, or otherwise sanctionable.

[6] Plaintiffs do cite to a singular statute, 8 U.S.C. § 1184(b), without explaining how this statute creates any form of non-discretionary duty to which they have a Fifth Amendment interest sufficient to support their constitutional claim. Indeed, that statute establishes a presumption of an alien's immigrant status "until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status." It does not demonstrate any constitutionally protected property or liberty interest.

7. Plaintiffs' desire to challenge the well-established doctrine of consular non-reviewability does not make Defendants' motion to dismiss sanctionable.

In seeking sanctions in response to Defendants raising the doctrine of consular non-reviewability, Plaintiffs confuse the standard for a motion to dismiss with the standard for Rule 11 sanctions. They argue they intend to challenge the doctrine of consular non-reviewability, and therefore it was not proper to raise that doctrine in Defendants' motion to dismiss. (Doc. 30 at 17). But whether Plaintiffs make a good faith argument for the reversal of existing law goes to whether they have made a frivolous argument under Rule 11. *See Smith v. Our Lady of the Lake Hosp., Inc.*, 960 F.2d 439, 444-45 (5th Cir. 1992). In a motion to dismiss for lack of subject matter jurisdiction, a defendant need only raise the challenge, and the plaintiff then bears the burden of establishing that the court has jurisdiction over the dispute. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Menchaca v. Chrysler Credit Corp*., 613 F.2d 507, 511 (5th Cir. 1980). And the case law makes clear Defendants had a valid basis for raising lack of subject matter jurisdiction pursuant to the doctrine of consular non-reviewability. *See Centeno v. Shultz*, 817 F.2d 1212, 1213 (5th Cir. 1987) ("the denial of visas to aliens is not subject to review by the federal courts"). As such, this well-supported assertion was not for any improper purpose or otherwise sanctionable.

8. Defendants' assertions of frivolousness were appropriate.

Plaintiffs assert Defendants' argument that Plaintiffs' complaint appears frivolous was sanctionable because it included a citation to an opinion not designated for publication and was based on allegations not in Plaintiffs' complaint. For the reasons

already set forth above, the citing of an unpublished opinion is not sanctionable. Further, Defendants' argument was based on a fair reading of Plaintiffs' complaint. In their motion to dismiss, Defendants argued the "lengthy complaint appears to infer conspiracy and false documents from administrative delays without identifying a legal basis for the requested relief." (Doc. 15, at 8). Plaintiffs deny any conspiracy can be inferred and conclude this argument of frivolousness is therefore sanctionable. But review of Plaintiffs' complaint indeed supports Defendants' argument. For example, in a sub-heading Plaintiffs allege "USCIS Denies Citizenship Application Based on Falsified Documentation." (Doc. 3 at 3 ¶ 6). In support of this conclusion, Plaintiffs allege Mrs. Carr's N-400 interview was delayed and ultimately denied based on "falsified records" leading to her interview being missed. *Id*. at 3 ¶ 6-8. They go on to allege these events were a result of "'whistleblower' retaliation for [Mr. Carr's] previous reports of federal crime and malfeasance by USCIS." *Id*. at ¶ 8. Defendants fairly characterized such allegations as inferring conspiracy based on agency delay. And Defendants explained throughout their motion to dismiss why Plaintiffs' claims of entitlement to relief are not legally sound. Defendants' arguments were appropriately based upon the law and on Plaintiffs' allegations, and Plaintiffs have failed to demonstrate how they are sanctionable.

IV. Conclusion

AUSA Padis never made any false statements during the course of this litigation, and all of the arguments in Defendants' motion to dismiss about which Plaintiffs complain were well grounded in both law and fact. Additionally, Defendants were

legally justified to make the arguments in their motion to dismiss, and it was not filed for delay or any other improper purpose. Therefor, Plaintiffs' motion for sanctions should be denied.

Respectfully submitted,

LEIGHA SIMONTON
UNITED STATES ATTORNEY

s/ Emily H. Owen

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Attorneys for Defendants

CERTIFICATE OF SERVICE

On May 29, 2024, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

s/ Emily H. Owen

Emily H. Owen
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BRIAN P. CARR, RUEANGRONG CARR, and BUAKHAO VON KRAMER, Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	Civil Action No. 3:23-CV-02875-S-BT

DEFENDANTS' RESPONSE TO PLAINTIFFS'
MOTION FOR RECONSIDERATION AND BRIEF IN OPPOSITION

Plaintiffs have filed a motion requesting that the Court reconsider its order denying Plaintiffs' motion for partial summary judgment, filed before Defendants' deadline to answer, as premature. Because the Court's order was both procedurally and substantively proper, Plaintiffs' motion should be denied.

I. Procedural History

Plaintiffs Brian P. Carr, Rueangrong Carr, and Buakhao Von Kramer filed this lawsuit arising out of their attempts to gain various immigration benefits on December 29, 2023. Defendants filed a timely motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (Doc. 8).

A few weeks later, Plaintiffs filed a document entitled "Response to Defendants' Motion to Dismiss" which included a response to the motion to dismiss, a motion to amend the complaint, and a motion for partial summary judgment. (Doc. 18, at 1, 51-52).

Counsel for Defendants later conferred with Mr. Carr, informing him Defendants were unopposed to the request to file an amended complaint and such filing would render the Defendants' then-pending motion to dismiss moot. (Doc. 21).

In response to Plaintiffs' motion for partial summary judgment, Defendants filed a motion to deny Plaintiffs' motion for partial summary judgment as premature under Federal Rule of Civil Procedure 56(d) on April 17, 2024. (Doc. 22).[1] Five days later, on April 22, 2024, the Court entered an order denying Plaintiffs' motion for partial summary judgment as premature, denying Defendants' motion to dismiss as moot, and issuing a schedule for the filing of Plaintiffs' amended complaint and responsive pleadings. (Doc. 26). The following day, Plaintiffs filed a "Reply in Support of Motion for Partial Summary Judgment and Response Opposing Defective Motion to Continue Consideration" regarding the already ruled-upon motions. Pursuant to the deadlines in the Court's order, Defendants have since timely filed a motion to dismiss Plaintiffs' amended complaint, and Plaintiffs have filed a response. (*See* Docs. 29 and 31).

Recently, Plaintiffs filed a motion for reconsideration of the Court's order granting Defendants' Rule 56(d) motion.[2]

In their motion for reconsideration, Plaintiffs request that the Court: (1) review

[1] These specific dates matter because Plaintiffs suggest that counsel for the government engaged in ex parte contacts with the Court, citing the proximity between the government's notice of substitution of counsel and the Court's order denying Plaintiffs' motion for partial summary judgment (Doc. 32, at 3–4), which is discussed *infra*.

[2] Plaintiffs also filed a second motion for partial summary judgment on the following day, and Defendants' deadline to respond has not yet expired. (Doc. 33).

Plaintiffs' response to Defendants' Rule 56(d) motion and "so note on the record"; (2) amend its April 22, 2024 order (Doc. 26) to "conform with" the original complaint and the amended complaint; and (3) "[r]ule on the legality of 56(d) [m]otions." (Doc. 32, at 6).

II. Argument & Authorities

The Court should deny Plaintiffs' motion for reconsideration because Defendants' motion was proper, and the Court's order granting that motion was both appropriately timed and substantively accurate. Further, even if the Court does decide to consider Plaintiffs' response filed after the order was entered, Defendants' Rule 56(d) motion should still prevail, and Plaintiffs' motion for reconsideration should be denied.

A. Defendants properly filed a Rule 56(d) motion.

Although Plaintiffs complain about various aspects of Defendants' Rule 56(d) motion, Defendants appropriately moved for relief under Rule 56(d), and the motion complied with all requirements under the Federal Rules of Civil Procedure and Local Rules of the Northern District of Texas.

Plaintiffs first allege that Defendants' Rule 56(d) motion did not contain a certificate of conference. This is false. A certificate of conference noting a lack of response to an attempt to confer is included on the final page of Defendants' motion. (Doc. 22, at 12).

Additionally, Plaintiffs argue Defendants improperly filed their request for relief under Rule 56(d) as a motion rather than as a response to Plaintiffs' motion for partial summary judgment. But courts regularly treat a motion as the proper vehicle for bringing

a Rule 56(d) request. *E.g. Am. Family Life Assur. Co. of Columbus v. Biles*, 714 F.3d 887, 894 (5th Cir. 2013) ("We review a district court's denial of a Rule 56(d) motion for abuse of discretion"); *Bassknight v. Deutsche Bank Nat. Trust Co.*, 3:12-cv-1412-M (BF) 2013 WL 1245563 at *1 (N.D. Tex. Mar. 4, 2013), *R&R adopted*, 2013 WL 1249580 at *1 (N.D. Tex. Mar. 26, 2013) (recommending request in joint status report be treated as Rule 56(d) motion notwithstanding failure to adhere to procedural requirements). And Plaintiffs have not cited to any authority suggesting this practice is incorrect. Defendants' Rule 56(d) motion was therefore procedurally proper.

B. The timing of the Court's order was appropriate.

Plaintiffs claim the Court's order granting Defendants' Rule 56(d) motion was premature, creating "serious [d]ue [p]rocess concerns." (Doc. 32, at 3). However, they cite to no authority to support this statement. There certainly are situations where a litigant is guaranteed an opportunity to respond. For example, the Second Circuit has determined a court abuses its discretion when it *sua sponte* dismisses a case after declining to exercise discretionary jurisdiction without providing notice. *Catzin v. Thank You & Good Luck Corp.*, 899 F.3d 77, 84 (2nd Cir. 2018). And a court may not sanction a party without providing an opportunity to respond. *Childs v. State Farm Mut. Auto. Ins. Co.*, 29 F.3d 1018, 1027 (5th Cir. 1994). Other procedural, non-case-dispositive orders, such as orders setting hearings or mandating reports or other submissions by certain deadlines, are regularly issued without notice.

Here, the order complained of does not dispose of any portion of Plaintiffs' case or issue any sanction. Instead, it merely denies Plaintiffs' motion for partial summary

judgment, filed before discovery is even allowed to begin, as premature. As a result, Plaintiffs' case will simply continue to move forward. The Court acted appropriately in issuing its order prior to Plaintiffs filing a response.

Plaintiffs also use the proximate timing of the Court's order (Doc. 26) and Defendants' notice of substitution of counsel (Doc. 27) to suggest the Court and counsel for Defendants had *ex parte* communications about "manag[ing] the transition between counsel." (Doc. 32, at 3). Defendants unequivocally deny any of their current or previous counsel have had any communication with the Court—oral, written, or otherwise—outside of the pleadings filed in this case, all of which have been served on Plaintiffs.

C. Even considering Plaintiffs' response, Defendants' Rule 56(d) motion was appropriately granted.

If the Court decides to reconsider its decision by reviewing Plaintiffs' response to Defendants' Rule 56(d) motion, the outcome should remain the same. "Rule 56(d) motions for additional discovery are broadly favored and should be liberally granted because the rule is designed to safeguard non-moving parties from summary judgment motions that they cannot adequately oppose." *Am. Family Life Assur. Co.*, 714 F.3d 887 at 894 (quoting *Raby v. Lingingston*, 600 F.3d 552, 561 (5th Cir. 2010)) (internal quotation marks omitted). And the Fifth Circuit has repeatedly explained that summary judgment is generally appropriate only after a non-movant has had a full opportunity to conduct relevant discovery. *See, e.g.*, *Bailey v. KS Mgmt. Servs., L.L.C.*, 35 F.4th 397, 401 (5th Cir. 2022). In fact, a 56(d) motion should generally be granted "almost as a

matter of course." *Wichita Falls Off. Assocs. v. Banc One Corp.*, 978 F.2d 915, 919 n.4 (5th Cir. 1992). To obtain relief, the party invoking Rule 56(d) must show "(A) that additional discovery will create a genuine issue of material fact"; and "(B) that [it] diligently pursued discovery." *Bailey*, 35 F.4th at 401.

As explained in Defendants' Rule 56(d) motion, discovery, if this case reaches that stage, will create a genuine issue of material fact. *See* App. 002–03, ¶¶ 3–5.[3] Additionally, Defendants' have not lacked diligence in pursuing discovery. Defendants have filed a motion to dismiss, and the threshold questions of subject matter jurisdiction and whether Plaintiffs have failed to state a claim upon which relief can be granted are currently pending in this Court. (Doc. 31). Defendants' deadline to file an answer has therefore not yet occurred. The parties therefore have not yet conferred in accordance with Rule 26(f), given that such conferences generally occur after the defendant files a response to the complaint. *See* Fed. R. Civ. P. 26(f)(2)–(3). But "[a] party may not seek discovery from any source" before the Rule 26(f) conference occurs, except for limited exceptions such as by stipulation or a court order. Fed. R. Civ. P. 26(d). Thus, discovery is not allowed under the Federal Rules of Civil Procedure at this time, and Defendants have not been dilatory by virtue of their compliance with the Federal Rules of Civil Procedure. Defendants' met their burden under Rule 56(d), and the Court properly granted their motion.

[3] App. in this document refers to the Appendix filed with Defendants' Rule 56(d) motion.

D. Corrections to the language in the Court's order are unwarranted.

Plaintiffs also request that the Court revise the language in its order. Specifically, they seek to have the phrase "various attempts by Ms. Carr and Ms. Von Kramer to obtain immigration benefits" replaced with a three-paragraph summary that includes multiple, unsupported assertions of law. The language complained of is contained in an introductory paragraph of the Court's order, characterizing Plaintiffs' (now-superseded) original complaint providing relevant procedural background to the Court's decision. (*See* Doc. 26, at 1). Plaintiffs' requested change would only serve to add unsupported statements of law to the Court's order. This change is therefore unwarranted, and Plaintiffs' request should be denied.

III. Conclusion

Defendants filed a procedurally proper Rule 56(d) motion showing good cause to deny Plaintiffs' motion for partial summary judgment as premature. Additionally, the Court entered an order that was both procedurally and substantively appropriate, consistent with the Fifth Circuit's instruction that, in these circumstances, Rule 56(d) motions should typically be granted "almost as a matter of course." *See Wichita Falls Off. Assocs.*, 978 F.2d at 919 n.4. For all of these reasons, Plaintiffs' motion for reconsideration should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On June 4, 2024, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Emily H. Owen
Emily H. Owen

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BRIAN P. CARR, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	Civil Action No. 3:23-CV-02875-S

DEFENDANTS' MOTION TO STRIKE, DENY, OR DEFER CONSIDERATION OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND BRIEF IN SUPPORT

Respectfully submitted,

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Introduction and Summary of the Argument

After the Court denied Plaintiffs' first motion for partial summary judgment as premature (Doc. 26) Plaintiffs have filed a second motion for partial summary judgment without seeking leave in violation of Local Civil Rule 56.2(b). Defendants therefore move to strike Plaintiffs' second motion for partial summary judgment. Additionally, as with Plaintiffs' first motion for partial summary judgment, the Court has not ruled on Defendants' pending motion to dismiss, and Defendants have not yet filed an answer. Defendants move under Federal Rule of Civil Procedure 56(d) for the Court to either deny Plaintiffs' summary judgment motion as premature or, in the alternative, to extend Defendants' response deadline until 60 days after a decision on Defendants' pending or to-be-filed motion to dismiss (within 14 days after the filing of Plaintiffs' contemplated amended complaint).

I. Background

Plaintiffs Brian P. Carr and Rueangrong Carr (husband and wife) together with Mrs. Carr's sister, Buakhao Von Kramer sue Defendants the United States of America and several other federal agencies for allegedly having violated the Due Process Clause of the Fifth Amendment to the U.S. Constitution. Plaintiffs also seek a monetary credit for future services from the United States Postal Service (USPS) for an allegedly delayed delivery of a package and a court order mandating that various federal agencies including the U.S. Department of Justice initiate investigations into the allegedly criminal circumstances surrounding their various attempts to obtain immigration benefits,

including naturalization for Mrs. Carr and a non-immigrant visa for Mrs. Von Kramer.

On March 8, 2024, the United States and the other federal agency Defendants timely moved to dismiss Plaintiffs' entire complaint. (Doc. 15). On March 28, 2024, Plaintiffs filed a document entitled "Response to Defendants' Motion to Dismiss" which included a response to the motion to dismiss, a motion to amend the complaint, and a motion for partial summary judgment. (Doc. 18 at 1, 51-52). Counsel for Defendants later conferred with Mr. Carr, informing him Defendants were unopposed to the request to file an amended complaint and such filing would render the Defendants' then-pending motion to dismiss moot. (Doc. 21).

In response to Plaintiffs' motion for partial summary judgment, Defendants filed a motion to deny Plaintiffs' motion for partial summary judgment as premature under Federal Rule of Civil Procedure 56(d). (Doc. 22). On April 22, 2024, the Court entered an order denying Plaintiffs' motion for partial summary judgment as premature, denying Defendants' motion to dismiss as moot, and issuing a schedule for the filing of Plaintiffs' amended complaint and responsive pleadings. (Doc. 26). The following day, Plaintiffs filed a "Reply in Support of Motion for Partial Summary Judgment and Response Opposing Defective Motion to Continue Consideration" regarding the already ruled-upon motions. Pursuant to the deadlines in the Court's order, Defendants have since filed a motion to dismiss Plaintiffs' amended complaint, and Plaintiffs have filed a response. (*See* Docs. 29 and 31). That motion is still pending with the Court, and, accordingly, Defendants have not yet filed an answer. On May 15, 2024, without requesting leave of the Court, Plaintiffs filed a second motion for partial summary judgment. (Doc. 33).

II. Legal Standards

A. Local Civil Rule 56.2(b)

In the Northern District of Texas, "unless otherwise directed by the presiding judge, or permitted by law, a party may file no more than one motion for summary judgment." U.S. Dist. Ct. Rules N.D.T.X., Civil Rule 56.2(b). This rule enables courts to "regulate successive motions that are filed after the court has devoted time and effort to deciding an initial motion" and disallows movants from having a "second bite at the apple." *Home Depot U.S.A., Inc. v. Nat'l Fire Ins. Co. of Hartford*, 3:06-CV-0073-D, 2007 WL 1969752, at *2 (N.D. Tex. June 27, 2007). When a litigant files a second motion for summary judgment without leave in violation of this local rule, it is appropriate for the Court to strike the second motion. *See Fu v. Chin*, 3:18-CV-2006-N-BN, 2021 WL 8014527, at *1 (N.D. Tex. Aug. 31, 2021) (Horan, M.J.).

B. Federal Rule of Civil Procedure 6(b)(1)(A)

District courts have discretion to grant extensions of time for good cause. *See* Fed. R. Civ. P. 6(b)(1)(A) (stating that courts may grant an extension for good cause "if a request is made [] before the original time or its extension expires"). So long as the request is made before the expiration of the time limit at issue, courts may extend time for any reason. *See L.A. Pub. Ins. Adjusters, Inc. v. Nelson*, 17 F.4th 521, 524 (5th Cir. 2021). Such requests "normally will be granted in the absence of bad faith on the part of the party seeking relief or prejudice to the adverse party." *Bakri v. Nautilus Ins. Co.*, No. 3:21-CV-2001-N, 2023 WL 1805142, at *1 (N.D. Tex. Feb. 7, 2023) (quoting 4B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1165 (4th ed. 2008)).

C. Federal Rule of Civil Procedure 56(d)

The Fifth Circuit has repeatedly explained that summary judgment is generally appropriate only after a non-movant has had a full opportunity to conduct relevant discovery. *See, e.g.*, *Bailey v. KS Mgmt. Servs., L.L.C.*, 35 F.4th 397, 401 (5th Cir. 2022). If a party moves for summary judgment prematurely, then the non-movant may move that the Court "defer considering the motion or deny it" under Rule 56(d). If the non-movant "shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition," the Court "may . . . defer considering the motion or deny it." Fed. R. Civ. P. 56(d)(1). To obtain relief, the party invoking Rule 56(d) must show that "(A) that additional discovery will create a genuine issue of material fact"; and "(B) that [it] diligently pursued discovery." *Bailey*, 35 F.4th at 401. "Such motions are broadly favored and should be liberally granted." *Culwell v. City of Fort Worth*, 468 F.3d 868, 871 (5th Cir. 2006); *see also Wichita Falls Off. Assocs. v. Banc One Corp.*, 978 F.2d 915, 919 n.4 (5th Cir. 1992) (explaining that these motions "should be granted almost as a matter of course").

III. Argument and Authorities

The Court has already denied Plaintiffs' first, premature motion for summary judgment. Despite the Court's prior ruling, Plaintiffs have again prematurely filed a second motion for summary judgment without seeking leave in violation of the Court's local rules. As such, Defendants' move that Plaintiffs' second motion for partial summary judgment be stricken. Further, when a plaintiff files a motion for summary judgment, it "essentially takes the position that [it] is entitled to prevail as a matter of law

because the opponent has no valid defense to the action." *Rogers v. McLane*, No. 5:22-CV-130-BQ, 2022 WL 17418978, at *2 (N.D. Tex. Nov. 14, 2022), *R&R adopted*, 2022 WL 17418016 (N.D. Tex. Dec. 5, 2022). Defendants have substantial defenses to this action and have a legal right to assert such defenses in response to Plaintiffs' partial summary-judgment motion, including those defenses set forth in Defendants' motion to dismiss. But Plaintiffs' premature motion here prevents Defendants from having the opportunity to fully articulate potentially case-dispositive defenses supported by evidence in the unlikely event Defendants' motion to dismiss is denied. Defendants therefore alternatively move that the Court defer adjudication of or deny Plaintiffs' early partial summary-judgment motion to allow these threshold questions to be resolved.

A. Plaintiffs' second motion for partial summary judgment should be stricken because it was filed in violation of Local Civil Rule 56.2(b).

A party may not file multiple summary judgment motions as a matter of right. *Home Depot*, 2007 WL 1969752 at *2. Courts may regulate, and disallow, the filing of successive motions. *Id*. Here, the Court has already denied Plaintiffs' first motion for partial summary judgment seeking an order mandating federal agencies grant various immigration benefits, including naturalization. (Doc. 18, at 52-57; Doc. 26, at 2). Plaintiffs now seek a second bite at the apple. They again request a court order mandating that federal agencies grant immigration benefits, including naturalization for Mrs. Carr. (Doc. 33, at 3). And, again, Plaintiffs have filed their motion while Defendants have a motion to dismiss pending with the Court and before an answer is due to be filed.

The Court has already considered, and denied, the exact issues presented by Plaintiffs' second motion for partial summary judgment. And Plaintiffs have not sought leave to have these issues considered again through a second motion. This is the situation Local Civil Rule 56.2(b) was intended to prevent. *See Home Depot*, 2007 WL 1969752 at *2. Because Plaintiffs have violated Local Civil Rule 56.2(b) and because the Court has already denied Plaintiffs' motion for partial summary judgment as premature, the Court should strike Plaintiffs' second motion for partial summary judgment.

B. Plaintiffs' second motion for partial summary judgment should be denied, or consideration should be deferred.

If the Court determines Plaintiffs' second motion for partial summary judgment should not be stricken, it should deny or defer consideration of Plaintiffs' motion. Technically, the Federal Rules of Civil Procedure allow a party to file a motion for summary judgment before an answer has been filed. *See* Fed. R. Civ. P. 56(a); *see also HS Res., Inc. v. Wingate*, 327 F.3d 432, 440 (5th Cir. 2003) (explaining that "an answer is not a prerequisite to the consideration of a motion for summary judgment"). "However, courts have approached such motions with extreme caution." *Matini v. Reliance Standard Life Ins. Co.*, No. 1:05-CV-944-JCC, 2005 WL 2739030, at *2 (E.D. Va. Oct. 24, 2005); *see also Rogers*, 2022 WL 17418978, at *3 (collecting cases where courts denied plaintiffs' summary judgment motions when they were filed before the defendant had answered or the court was still conducting preliminary screening).

"Federal courts . . . are permitted to dismiss a motion for summary judgment without prejudice if it is filed before any party answers." *Dowl v. Prince*, No. 11-CV-

0417, 2011 WL 2457684, at *1 (E.D. La. June 20, 2011). In fact, a court should *not* grant a summary-judgment motion filed before an answer "unless in the situation presented, it appears to a certainty that no answer which the adverse party might properly serve could present a genuine issue of fact." *Stuart Inv. Co. v. Westinghouse Elec. Corp.*, 11 F.R.D. 277, 280 (D. Neb. 1951). As a result, courts both in this district and across this Circuit have often denied plaintiffs' summary judgment motions as premature when filed before an answer. *See, e.g.*, *Rogers*, 2022 WL 17418978, at *3; *Watkins v. Monroe*, No. 6:18-CV-347, 2019 WL 1869864, at *1 (E.D. Tex. Mar. 27, 2019), *R&R adopted*, 2019 WL 18581000 (E.D. Tex. Apr. 25, 2019); *Kuperman v. ICF Int'l*, No. Civ. A. 08-565, 2008 WL 647557, at *1 (E.D. La. Mar. 5, 2008); *Wartsila v. Duke Cap. LLC*, No. Civ. A. H-06-3908, 2007 WL 2274403, at *5 (S.D. Tex. Aug. 8, 2007); *see also Gabarick v. Laurin Mar. (Am.), Inc.*, 406 F. App'x 883, 889–90 (5th Cir. 2010) (remanding case because the grant of summary judgment was premature as the pleadings were "in their infancy" and "very little discovery [had] taken place").

Adjudicating a plaintiff's summary-judgment motion before the defendants "have yet to file answers to the complaint or oppositions of a substantive nature to the motions for summary judgment" could result in a decision that "overlook[s] material issues of fact which might have been raised." *First Am. Bank, N.A. v. United Equity Corp.*, 89 F.R.D. 81, 87 (D.D.C. 1981).

That exact result is a possibility here based on the current deadlines. After all, Defendants assert that lack of subject-matter jurisdiction and failure to state a claim may bar Plaintiff from receiving any relief on his claims in this case. Moreover, Defendants

are still evaluating whether Defendants have any other defenses that should be explored in discovery. A ruling on Defendants' motion to dismiss would likely significantly narrow the matters at issue on summary judgment. As a result, Defendants seek a ruling on Defendants' motion to dismiss and the opportunity to file an answer and engage in discovery before Plaintiffs' partial summary-judgment motion is evaluated by the Court.

C. The Court should defer or deny Plaintiffs' motion for summary judgment under Federal Rule of Civil Procedure 56(d).

Defendants move that the Court defer consideration of or deny Plaintiffs' motion for summary judgment under Rule 56(d) because discovery will be necessary for Defendants to adequately respond to Plaintiffs' motion if Defendants' own motion to dismiss is denied, but the Federal Rules do not allow for discovery at this stage of litigation. *See Bailey, L.L.C.*, 35 F.4th at 401 (requiring a party to show that additional discovery will create a genuine issue of material fact and diligence).

1. Discovery would be appropriate here as it will create a genuine issue of material fact.

As Defendants have asserted in the pending motion to dismiss, Plaintiffs have not stated a claim. *See* Fed. R. Civ. P. 12(b)(6). If this case survives the motion to dismiss, the undersigned AUSA would like the opportunity to investigate the circumstances of Plaintiffs' underlying disputes.

The Fifth Circuit has repeatedly held that a district court abuses its discretion by denying a proper Rule 56(d) motion before the close of the discovery period. *Bailey*, 35 F.4th at 401 (holding that a Rule 56(d) movant averred that additional discovery would create a genuine fact dispute and that she diligently pursued discovery such that "the

district court abused its discretion in holding otherwise."); *see id.* at 399 ("This is the third time we have been asked to consider whether a particular district court can deny discovery rights protected by the Federal Rules of Civil Procedure . . . . We have twice held no," and [t]oday we so hold a third time."). "When a party is not given a full and fair opportunity to discover information essential to its opposition to summary judgment, the limitation on discovery is reversible error." *Access Telecom, Inc. v. MCI Telecomm. Corp.*, 197 F.3d 694, 720 (5th Cir. 1999). Other U.S. courts of appeals have similarly held that district courts "[t]ypically" abuse their discretion if they deny a timely and proper Rule 56(d) motion and rule on a Rule 56 motion before the parties have an opportunity for discovery. *See, e.g.*, *In re PHC, Inc. S'holder Litig.*, 762 F.3d 138, 144 (1st Cir. 2014) (citing *CenTra, Inc. v. Estrin*, 538 F.3d 402, 420 (6th Cir. 2008)).

If Defendants motion to dismiss is denied, Defendants would seek discovery on various issues to establish a genuine dispute of material fact. *See* App. 002–03, ¶¶ 3–5.[1] This information is essential to allow Defendants to fully respond to Plaintiffs' assertions in their partial summary-judgment motion. *See* App. 003, ¶¶ 5–6.

2. Defendant cannot even begin discovery at this time.

As explained in detail above, Defendants' deadline to respond to the complaint has not yet occurred. *See* App. 002, ¶ 3. Thus, logically, the parties have not yet conferred in accordance with Rule 26(f), given that such conferences generally occur after the defendant files a response to the complaint. *See* Fed. R. Civ. P. 26(f)(2)–(3). But "[a]

[1] "App." citations refer to the appendix being filed with this motion.

party may not seek discovery from any source" before the Rule 26(f) conference occurs, except for limited exceptions such as by stipulation or a court order. Fed. R. Civ. P. 26(d). Thus, discovery is not allowed under the Federal Rules of Civil Procedure at this time.

Moreover, Plaintiffs would be still allowed 30 days to respond to any written discovery requests under the Rules. *See, e.g.*, Fed. R. Civ. P. 33(b)(2); Fed. R. Civ. P. 34(b)(2)(A); Fed. R. Civ. P. 36(a)(3). Thus, even if Defendants had served written discovery the day after Plaintiffs filed their summary-judgment motion (which discovery would have been in violation of the Federal Rules), Plaintiffs would not have been required to respond to the discovery requests until after Defendants' deadline to respond to the summary-judgment motion. Thus, Defendants has not been dilatory in seeking the necessary discovery. Indeed, Defendants literally cannot request discovery yet and realistically would have not received much (if any) of the requested information in time to incorporate into any summary-judgment response.

D. In the alternative, Defendants have established good cause for an extension of time to respond to Plaintiff's summary-judgment motion.

To the extent the Court does not strike Plaintiffs' motion, dismiss Plaintiffs' motion without prejudice, or does not defer consideration of or deny Plaintiffs' motion under Rule 56(d), Defendants would respectfully request an extension of time to respond to Plaintiffs' partial summary-judgment motion. A court may, for good cause, extend time "for any reason" if the request is made "prior to the expiration of the time limit at issue." *Nelson*, 17 F.4th at 524 (citing Fed. R. Civ. P. 6(b)(1)(A)). Rule 6(b)(1)(A)

"should be liberally construed to advance the goal of trying each case on the merits." *Rachel v. Troutt*, 820 F.3d 390, 394 (10th Cir. 2016). Indeed, district courts normally grant extension requests made before the deadline in the absence of bad faith by the requesting party or prejudice to the adverse party. *See Reed Migraine Ctrs. of Tex., PLLC v. Chapman*, No. 3:14-CV-1204-N, 2020 WL 869888, at *1 (N.D. Tex. Feb. 21, 2020) (quoting 4B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1165 (4th ed. 2008)).

Defendants request an extension of time to respond until 60 days after the Court issues a decision on Defendants' motion to dismiss Plaintiffs' amended complaint. This would ensure neither the parties nor the Court are expending unnecessary resources on briefing and evaluating the summary-judgment motion if the matter is dismissed either in whole or in part based on Defendants' pending Rule 12 motion. Defendants would also request this additional time to respond to the summary-judgment motion so that they are not simultaneously briefing a motion to dismiss and a summary-judgment response in this case. Further, this extension would allow Defendants time to prepare the necessary affidavit(s) to file with Defendant's summary-judgment response.

This extension also would not unduly prejudice Plaintiffs, as it would not result in any significant delay in adjudicating this case. Moreover, it would also inure to Plaintiffs' benefit to avoid further summary-judgment briefing for any resolved claims and to avoid responding to the motion to dismiss and completing the summary-judgment briefing at the same time.

IV. Conclusion

Plaintiffs' second motion for partial summary judgment was filed without leave in violation of the Local Civil Rules and should therefore be stricken. It is also premature because it comes well before Defendants has answered the complaint and before the threshold questions, of subject-matter jurisdiction and whether a proper claim has been asserted, have been decided. Therefore, the Court should strike Plaintiffs' second motion for partial summary judgment, defer considering Plaintiffs' partial summary-judgment motion while these issues remain outstanding, or deny it as premature.

Date: June 5, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

On June 5, 2024, I electronically filed the above response with the clerk of court for the U.S. District Court, Northern District of Texas. I certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Emily H. Owen
Emily H. Owen

CERTIFICATE OF CONFERENCE

On June 3, 2024, I conferred with pro se Plaintiff Brian Carr who stated Plaintiffs are opposed to the relief sought in this motion.

/s/ Emily H. Owen
Emily H. Owen

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BRIAN P. CARR, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	Civil Action No. 3:23-CV-02875-S

APPENDIX

Respectfully submitted,

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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BRIAN P. CARR, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	Civil Action No. 3:23-CV-02875-S

RULE 56 DECLARATION OF EMILY H. OWEN

I, Emily H. Owen, declare:

1. I am competent to make this declaration, and the facts in this declaration are within my personal knowledge.

2. I am a member of the state bar of Texas, admitted to practice before this Court, and as an Assistant United States Attorney for the United States Attorney's Office for the Northern District of Texas. I represent the Defendants in this case.

3. Plaintiffs filed a second motion for partial summary judgment before Defendants received a ruling on Defendants' motion to dismiss and before Defendants' deadline to file an answer.

4. If Defendants' motion to dismiss is denied, Defendants intend to seek discovery to respond to the allegations in the complaint (or the contemplated amended complaint), including serving written discovery on each Plaintiff and taking the depositions of each Plaintiff. Defendants may

need to rely upon an administrative record, which has not yet been assembled or filed in this case.

5. Completing the above-mentioned discovery is necessary to fully respond to the assertions that Plaintiffs rely upon in their motion.

6. Defendants cannot at this time present facts essential to justify its opposition to Plaintiffs' motion.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 5, 2024, in Dallas, Texas.

_____
Emily H. Owen
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

Brian P. Carr, Rueangrong Carr, and Buakhao Von Kramer Plaintiffs versus United States, US Department of Justice, USPS, USPS OIG, USPS BoG, US CIGIE, Department of State, Department of State OIG, USCIS, DHS OIG, and SSA Defendants	Civil No. 3-23CV2875 - S Plaintiff's Reply in Support of Motion for Sanctions (ECF 30)

Reply in Support of Motion For Sanctions

Meritless Pleadings and Other Improper Antics

Have Resulted in Excessive Delays

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I Background

AUSA Padis is undoubtedly overworked with far too many cases to provide adequate attention to each (which is probably the case for virtually every AUSA and the court and virtually all federal judges). In light of an overwhelming workload, the only viable solution is to juggle cases, taking minimal time to push off the current deadline to then work on the next critical deadline, just 'fighting fires' in the common vernacular. There is nothing improper about that per se.

Lying and Tricks to Delay, Callous Disregard to Plight of Mrs. Carr

However, in this matter AUSA Padis took improper shortcuts to delay to include lying to Mr. Carr in a government email in an effort to trick Mr. Carr into granting an extension of almost 60 days.

The trick was unsuccessful but Mr. Carr did inform AUSA Padis that over a year ago USCIS had approved Mrs. Carr's 10 ten green card and citizenship but USCIS has not provided her with the promised Certificate of Naturalization and the rights and privileges of citizenship.[1] USCIS has also left Mrs. Carr in dire circumstances with no documentation of her legal status and an apparent 'undocumented alien' (a.k.a. an 'illegal').[2] She has had realistic fears of being deported at any time by ICE (she doesn't trust U.S. immigration), vigilantes (under Texas SB4), or National Guardsmen (on day one to deport millions of illegals who are poisoning the blood of our nation).

Mr. Carr understood that a week was not a lot of time for an adequate Answer to

1 Mr. Carr sent AUSA Padis a copy of ECF 10-5, the USCIS decision of 30 Jan 2023 which stated:
We have approved your I-751, Petition to Remove Conditions on Residence. Our records also indicate we have approved your Form N-400 Application for Naturalization. Because we also approved your N-400, you will not receive a new Permanent Resident Card (also known as a Green Card). Instead, once you have taken the Oath of Allegiance, you will receive a Certificate of Naturalization, which will be proof of your U.S. citizenship.

2 All previous USCIS documents of lawful permanent resident status had expired, see ECF 24-1, 18-6, 20-2.

the serious concerns raised in the Complaint and offered to grant AUSA Padis whatever extension he needed if he could help expedite resolution of Mrs. Carr plight. AUSA Padis replied that he would provide a 'timely response' which Mr. Carr correctly understood as a shoddy Motion to Dismiss (as most AUSAs have an overwhelming case load).

False and Misleading Statements Delay Resolution

AUSA Padis did indeed file a timely response in the form of a Motion to Dismiss, but Mr. Carr was disappointed as it was particularly egregious with clearly misleading summaries of the facts, highlighting minor details but omitting critical facts.

For example AUSA Padis devotes great length to describing USCIS's later unlawful decision on 13 Oct 2023 (ECF 10-10) denying Mrs. Carr's citizenship but at no time has USATXN ever mentioned the prior approval of her citizenship over 8 months before (ECF 10-5). This sort of misleading summaries does not lead to prompt and just resolution of disputed matters (e.g. whether the second USCIS decision was unlawful), but instead just wastes the time of the court and other parties trying to sort out what is important and what is irrelevant.

When AUSA Padis is unable to create suitably misleading summaries to support his malformed challenges, he goes on to add false restatements such as claiming:

- Plaintiffs want their 'money back' when they actually conscientiously ask for credits for future service.
- Plaintiff's seek 'ordering federal law enforcement to investigate alleged crimes' when they actually require OIG's to report crimes to DoJ and DoJ to refer matters as necessary (if not already referred by OIG) and monitor the results to insure

future compliance.

- Plaintiff's 'infer conspiracy and false documents from administrative delays' which on later discussions with USATXN does not apply to anything in the Complaint causing the entire 'frivolous' Argument E to be dropped in the 2nd Motion to Dismiss.

Prompt and just resolution of complex issues requires careful analysis of the facts and law. Such misleading and false summaries only create confusion.

II. Legal Standards

A. FRCP Rule 11

FRCP Rule 11 is one of the authorities for sanctions in this matter as well as the criteria for whether sanctions are applicable. FRCP Rule 11(b) provides the standards under which sanctions can be applied and FRCP Rule 11(c)(3) provides the only meaningful authority, i.e. on the court's own initiative it may issue an Order to Show Cause for why the sanctions should not be ordered.

B. 28 USC § 1927

Under 28 USC § 1927,[3] a court may sanction an attorney personally who multiplies the proceedings in a case unreasonably and vexatiously. It is not strictly applicable in this matter due to relief sought but demonstrates that Congress felt that attorneys can be held personally responsible for their actions. Of course, the court already had the authority to hold individuals responsible for their behavior

C. Local Rules

This court may sanction an attorney under Local Rule 83.8(b)(3) for unethical behavior which is defined as conduct that violates the Texas Disciplinary Rules of Professional Conduct, which includes 4.01 prohibiting a lawyer from knowingly

3 AUSA Owen has a typographical error of citing 28 USC § 1972 in numerous locations throughout her Brief but she quotes the correct statute of 28 USC § 1927 though it is not listed in citations.

making a false statement of material fact or law to a third person.

D. 18 USC § 1001

This is a criminal statute of falsification of government records which can not be directly enforced by this court in this context, but violations are serious concerns (not casual conversations or unverified pleadings). It should also be noted that Mr. Carr was aware the AUSA Padis was a government agent and hence bound to be truthful in these government emails and that Mr. Carr was himself equally bound to be truthful. This was not a casual conversation in a bar.

E. 18 USC § 1621

This is the criminal statute for perjury. It is relevant as each of Mr. Carr's later pleadings after the original complaint have been verified / affirmed under penalty of perjury indicating that Mr. Carr strives to be truthful and accurate in all matters related to this suit.

III. Argument and Authorities

A. AUSA Padis Made False Statements to Mr. Carr

1 AUSA Padis Knew the Difference Between Improper Service and No Service

In an email on 1 Mar 2024 (in ECF 28-1) AUSA Padis stated this 'Office has no record of having been served in this case.' which he knew was not true.

AUSA Owen claims 'the statements of which Plaintiffs complain were true. In reality, Plaintiffs have misunderstood legally significant terms and decided the use of those terms must therefore be false.'

According to Black's Law Dictionary, 2nd Ed, 'service is the term for the delivery

of a summons, writ or subpoena to the opposing party in a law suit.'[4]

On 26 Apr 2024 AUSA Padis later 'restated' that claim with 'I indicated I believed that service was improper and offered to accept service'.

It is apparent AUSA Padis knew that 'service' is the delivery of the complaint and summons to an appropriate person (the opposing party) and so described delivery by a party to the suit as improper service.

Clearly, AUSA Padis believed that there were two kinds of service, proper and improper. This is in contrast to Miedreich v. Lauenstein, 232 U.S. 236 (1914) cited previously where there was no service as the sheriff did not deliver the papers but swore that he had. No service is different from improper service.

Claiming no service is distinctly different from claiming improper service and this was not a simple typographical error.

The actual text which AUSA Padis sent on 1 Mar 2024 (ECF 28-1) stated:

> I have been made aware of the above-captioned civil action, but the U.S. Attorney's Office has no record of having been served in this case. See Fed. R. Civ. P. 4(i)(1)(A) (requiring that among other things a party must deliver a copy of the summons and the complaint to the United States attorney).
>
> If you reply with a summons and a copy of the complaint, I will email you a letter confirming that I am accepting service on behalf of the U.S. Attorney.

4 The Wex dictionary by the Cornell Legal Information Institute states:
Service is the formal delivery of litigation documents to give the opposing litigant notice of the suit against them. The concept requiring proper service before individuals may be brought to court is also often referred to as service of process. In addition to federal statutes and rules, the Fifth Amendment of the Constitution requires procedural due process protections in the form of adequate service.

An alternative in line with AUSA Padis' claim 'I indicated I believed that service was improper and offered to accept service' would be:

> I have been assigned to the above-captioned civil action, but our records indicate that service was improper. See Fed. R. Civ. P. 4(c)(2) ... 'Any person who is at least 18 years old and not a party may serve a summons and complaint.'
>
> If you reply with a summons and a copy of the complaint, I will email you a letter confirming that I am accepting service on behalf of the U.S. Attorney.

It is clear that AUSA Padis was attempting to deceive Mr. Carr that there were no records of service (i.e. 'no service' and that AUSA Padis did not already have a copy of the complaint and summons) rather than improper service (by a party to the suit).[5]

Further, on 17 Apr 2024 AUSA Padis in an email (see ECF 30-1) claimed 'I indicated I believed that service was improper and offered to accept service' is also a false statement as 'improper service' is different from 'no service'. This is another false statement.

2 False Statements Justify Sanctions

It is clear that AUSA Padis sent the email on 1 Mar 2023 in order to delay (presumably juggling an overwhelming caseload) and hoped to get an almost 60 day extension by delaying the date of service from 9 Jan 2024 to 1 Mar 2024 or later.

5 The restriction of FRCP Rule 4(c)(2) has a long history based on the court requiring 'proof of service' to demonstrate timely and adequate notice for personal jurisdiction under Due Process. It has long been held that a party to the suit or someone under 18 are not reliable enough for adequate **proof** of service.

However, there were side effects of tricking Mr. Carr to send documents which AUSA Padis did not need (sumnmons and complaint) which wasted Mr. Carr's time preparing his response. In that response Mr. Carr notified AUSA Padis of Mrs. Carr's dire circumstances and the critical decision of USCIS in ECF 10-5 which AUSA Padis ignored in all future filings.

While AUSA Padis did not cause apparent delays through this trick, sanctions are warranted for wasting Mr. Carr's time and undermining trust in government records (making falsification of government records the norm rather than the exception). It also indicates AUSA Padis propensity to improper delaying tactics when evaluating the later Motion to Dismiss which did led to substantial delays.

3 Challenges to Service Cause Delays, Almost Never Resolution of Issues

It is important to note that challenges to service almost always lead to delays and almost never lead to the resolution of any issue. In order for a defendant to contest proper service (and the implicit lack of personal jurisdiction through adequate notice) the defendant has to appear in the matter (now trivially easy via ECF) and once they appear adequate notice is presumed (how can they claim they didn't know about a suit which they have appeared in).

In extremely rare cases this delay can be sufficient to block aspects of the suit due to statute of limitations for the relief sought, but this is rare and generally not a just resolution.

I personally was surprised by AUSA Owen's statement:

> a plaintiff must either "deliver a copy of the summons and of the complaint to the United States attorney ... or send a copy... to the civil-process clerk at

> the United States attorney's office." Fed. R. Civ. P. 4(i)(1)(A). ... The attempt to achieve service by mail was ineffective because it was not directed to the correct individual. The summons and complaint were mailed to the United States Attorney for the Northern District of Texas, not to the civil-process clerk as required. (Doc. 10).... Therefore, service was not effectuated by that mailing. See Jackson v. Ray, 4:21-cv-00811-O 2021 WL 4848898, at *3 (N.D. Tex. Sept 23, 2021)

On reviewing Jackson it was apparent that AUSA Stoltz caused significant delays by filing a 'Notice Regarding Lack Of Service Of Process' (ECF JR 11 on 7 Sep 2021) rather than the normal 'Motion to Dismiss' (MTD which was filed as ECF JR 20 on 26 Sep 2021 with a delay of 19 days, a hardly significant advantage for USATXN). I personally question the magistrates' decision to deny the Motion for Default Judgment (MDJ, ECF JR 15) based on improper service. The result was extended litigation finally resolved on 2 Dec 2021 with ECF JR 51 after several motions for sanctions. Very messy indeed.

It is clear that had AUSA Stolz simply filed the MTD to start with, several, if not most, of the numerous later filings could have been avoided. However, once that inflection point had passed, I personally would have recommended that the magistrate promptly deny the MDJ based on default judgments being an anathema to Due Process and that the courts' personal jurisdiction was not yet clear.

The magistrate could then also issue Orders to Show Cause for sanctions against both Jackson and AUSA Stolz. Jackson would have to justify why the proper address was not used for USATXN as improper service unnecessarily burdened the court with demonstrating timely and adequate notice in order for the court to have personal jurisdiction. AUSA Stolz would have to demonstrate how the clerical

error of sending the summons and complaint directly to the US Attorney caused any delay in timely and adequate notice as required by Due Process.

An Order to Show Cause provides sufficient Due Process safeguards to support quasi-criminal sanctions and so imprisonment and disbarment would be possible sanctions, but clearly excessive.[6] However, minor sanctions such as community service and early filings would likely have had the effect of discouraging future inappropriate filings. Optimistically the matter could have been dismissed with a docket of 30 records on 1 Nov 2021 with the added benefit that all parties would be more careful about future filings.

Of course this is all speculative. The point is that USATXN's focus on and claims of improper service show a propensity to delay rather than prompt and just results.

As noted previously, had AUSA Padis been truly interested in prompt and just resolution of the matters at hand, he could have just filed the MTD as a timely response without all the wasted time concerning service. There was clearly timely and adequate notice so why waste the time of all parties. Filing the timely MTD made all questions of notice and personal jurisdiction moot.

The evaluation of the first MTD in this matter should consider this propensity to delay.

B. Defendants' Motion to Dismiss was Without Merit

1. FRCP Rule 11(c)(2) and 28 USC § 1927 sanctions are unavailable.

AUSA Owen correctly notes that FRCP Rule 11(c)(2) does not apply to this matter

6 This is similar to incarcerating 40,000 USPS drivers in its absurdity.

because the required prior notice has not been provided and the relief sought falls outside the scope of FRCP Rule 11(c)(2). However, FRCP Rule 11(c)(3) does support appropriate sanctions on the initiative of the court through an Order to Show Cause.

This is particularly important as the proposed sanctions include community service which infringes on the freedom of AUSA Padis. As such, community service sanctions require quasi-criminal proceedings with Due Process protections for AUSA Padis. Here the Order to Show Cause is essential as AUSA Owen has responded to this Motion rather than AUSA Padis while the sanctions are directed against AUSA Padis. The Order to Show Cause would be directed to AUSA Padis and would provide him with his Due Process right present his case.

As such there was an error in the title of this motion as it actually needs to be a Motion for an Order to Show Cause, Why the Court Should Not Impose the Proposed Sanctions. Of course FRCP Rule 11(c)(3) sanctions are exclusively within judicial discretion (on the court's initiative), but that is generally true of all sanctions (so this could be viewed as a harmless error). If this motion is granted with an Order to Show Cause, AUSA Padis will have an opportunity to argue against the particular sanctions chosen by the court,

The court certainly has the authority to make the requested sanctions as stated in Ex Parte Robinson, 86 U.S. (19 Wall.) 505, 510 (1874):

> The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of

> the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.

Of course in Ex Parte Robinson it was accepted as a given that for what has come to be known as quasi criminal sanctions, the sanctioned party must be given the ability to respond, the essence of the Order to Show Cause.

2a. Citations to 'not precedent' Cases Not Appropriate

When a court clearly states that a case is not precedent, citing the case outside the limited domain specified indicates a disregard for the orders of the court as stated in their Local Rule 47.5.4.[7] It is important to note that in Dec 2006 the Fifth Circuit Court altered Local Rule 47.5.4 to remove the persuasive clause (highlighted in Bold) from:

> ...or the like). **An unpublished opinion may, however, be persuasive.** An unpublished opinion...[8]

The explicit removal by Fifth Circuit Court of the sentence makes it clear that that court does not want such cases cited in normal legal arguments even for 'persuasive arguments'. While it is certainly true that a party can cite such cases, it is incumbent on the party to note that the case is 'not precedent' and demonstrate that it is relevant to the matter at hand for reasons other than precedent. No court is bound by a 'not precedent' case.

While AUSA Owen cites a 2021 case in which the Fifth Circuit cited a 2016 not

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7 Fifth Circuit Court Local Rules 47.5.4 states:
Unpublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, notice, sanctionable conduct, entitlement to attorney's fees, or the like). An unpublished opinion may be cited pursuant to FED. R. APP. P. 32.1(a)....

8 See ECF 39-1 5thCirIOPchng20061201.pdf which is an email exchange where the Fifth Circuit Court Webmaster documented the removel of the 'persuasive' sentence.

precedent case, relying on an early 2006 decision,[9] that was an apparent error as the entire Fifth Circuit Court had decided after the cited 2006 decision that in the future 'not precedent' cases should not be cited for their persuasive value.

Presumably judges of the Fifth Circuit Court can rely on 'not precedent' cases as they choose (thereby creating new precedence which borrows from portions of the 'not precedent' cases), but that hardly authorizes normal litigants to violate the rules of circuit court concerning relying on 'not precedent' cases in normal legal arguments.

2b Starrett Based Argument E False and Misleading

In Argument E AUSA Padis not only cited Starrett v. Lockheed Martin Corp. et al., 735 F. Appx 169, 170 (5th Cir. 2018) a 'not precedent' case in violation of Fifth Circuit Local Rules, there was no effort to explain why it was of relevance to the court. This was clearly misleading.

Further, Starrett is an allegation based decision with excerpted allegations in the decision of:

> defendants conspired to use him for mind experiments, targeted him with "Remote Neural Monitoring," harassed him using "Voice to Skull" technology, and otherwise remotely monitored and controlled his thoughts, movements, sleep, and bodily functions.

but AUSA Padis' only references to the complaint allegations was that the Plaintiffs ”**infer conspiracy and false documents from administrative delays**”.

9 Bailey v. Fisher 647 F. App'x 472 (5th Cir. 2016), a 'not precedent' case, was cited in Butler v. Porter 999 F.3d 287 (5th Cir. 2021) which relied on the sentence 'An unpublished opinion may, however, be persuasive.' from Ballard v. Burton 444 F.3d 391 (5th Cir. 2006) from March when 'An unpublished opinion may, however, be persuasive.' was permissible, the Local Rules had not been changed as yet.

While the Starrett allegations certainly seem to support the descriptions of fantastical and delusional, the terms do not seem justified by the eight words presented by AUSA Padis. It is plausible that a rationale plaintiff could infer conspiracy and false documents from administrative delays under extreme circumstances (such as an over 4 year delay in providing a statutory mandated green card) so clearly Starrett does not apply to those specific allegations (even if Starrett was a case with precedence).

The more serious problem with AUSA Padis' Argument E is that there are no allegations in the entire Complaint (with over 250 specific allegations) which 'infer conspiracy and false documents from administrative delays'.

There are extraordinary allegations of falsified government records (a crime) in the form of 1.9 falsified USPS delivery times but this is not inferred from delays, but rather a reference to the 1.9 million improper 'stop the clock' scans where packages were scanned as delivered while still at the Post Office (not delivery address) from the USPS OIG 2017 audit which is included in the record, DR-AR-18-001, ECF 18-7.

It is also inferred that illegal orders are likely the reason USPS IG refused to report such crimes to DoJ (as mandated in the 5a USC IG Act of 1978) but this inference is not of any conspiracy or based on administrative delays, but rather a claim by USPS OIG that they can decide what crimes should not be prosecuted (see ECF 10-1).

After lengthy discussions with AUSA Padis, he admitted that there were no

allegations which mentioned conspiracy and no allegations of false documents from administrative delays. However, even though AUSA Padis knew that the entire one page Argument was based on those eight words (with lengthy references to relief sought which were irrelevant for an allegation based argument) and citing a 'not precedent case' (which has no merit as case law), he did not withdraw the argument as requested.

There is an extensive refutation of this argument in ECF 18, (Plaintiffs' Response opposing the Defendants' Motion to Dismiss ECF 15) pages 41 to 50. It is rather lengthy but it is hard to defend against a vague and non-specific challenge which doesn't actually refer to the Complaint at all.

2c AUSA Owen's Attempt to Restate the False Claim Fails

AUSA Owen attempts to defend the claim of 'infer conspiracy and false documents from administrative delays' by, for the first time, focusing on the USCIS cause of action and then states:

> Plaintiffs allege Mrs. Carr's N-400 interview was delayed and ultimately denied based on "falsified records" leading to her interview being missed. Id. at 3 paragraph 6-8. They go on to allege these events were a result of "'whistleblower' retaliation for [Mr. Carr's] previous reports of federal crime and malfeasance by USCIS." Id. at paragraph 8. Defendants fairly characterized such allegations as inferring conspiracy based on agency delay.

This restatement is false as we never claimed that any N-400 interview was delayed. We actually complained the original N-400 interview was earlier than publicized guidance (ECF 11-1 para 148 and 154). The second N-400 interview was scheduled after the N-400 application was already approved. Our complaint

concerning the later interview was lack of jurisdiction (ECF 11-1 para 210-214) as well as falsified records, but not delay.

It is a factual allegation that we complained to the DHS OIG about possible 'whistleblower' retaliation, but that was secondary to the complaints of falsifying records and denying an N-400 application which had already been approved. There had been prior complaints to DHS OIG about USCIS unlawfully leaving my wife stranded in Thailand (ECF 11-1 para 151-153) and falsifying records (claiming the original interview was canceled and never took place, ECF 11-1 para 190-193) so retaliation was a plausible allegation to DHS OIG, but retaliation is not an issue before this court. There is no aspect of this USCIS complaint which could be described as conspiracy.

The actual allegations cited by AUSA Owen from ECF 11-1 are:

> 6. On 31 Jan 2023 as a result of a joint interview held on 30 Jan 2023 for a permanent green card (I-751) and for citizenship (N-400), the United States Citizenship and Immigration Service (USCIS) approved Mrs. Carr's I-751 application for a permanent green card while not actually providing the green card as her N-400 citizenship application was also approved.
> 7. However, instead promptly providing Mrs. Carr with a Certificate of Naturalization, on 01 Sep 2023, USCIS updated her N-400 record to note that the interview of 30 Jan 2023 was canceled due to unforeseen circumstances.
> 8. Mr. Carr complained to USCIS, the Department of Homeland Security (DHS) OIG and DoJ of falsified records (the interview had been completed and the N-400 had been approved). Even so, USCIS scheduled a 'second' N-400 interview for 11 Oct 2023, a date when USCIS had been informed that Mrs. Carr would be out of the country. Mr. and Mrs. Carr made numerous efforts to reschedule the interview which were refused. USCIS denied Mrs. Carr's N-400 application on 14 Oct 2023 for 'failure to appear'. Mr. Carr has

> since complained to DHS OIG of 'whistleblower' retaliation for his previous reports of federal crimes and other malfeasance by USCIS.[10]

AUSA Owen's claim that the complaints to DHS OIG of possible retaliation are 'conspiracy based on administrative delays' is simply false.

There is nothing in the allegations in this matter which rise to the level of Starrett's allegation that Defendants 'remotely monitored and controlled his thoughts, movements, sleep, and bodily functions.' Even so, Starrett is a not precedent case and is not case law applicable to this court.

It is clear that AUSA Padis's specious and spurious Argument E served no purposes other than to mislead the court with false and misleading claims and to delay the prompt and just resolution of this matter.

2d Aguilera Based Visa Claim of Executive Discretion Fails

In AUSA Padis' Argument D he makes a challenge of failure to state a claim for visa denials but only describes executive discretion citing cases about 'adjustment of status' which has no relevance to any of the claims. Executive discretion is dependent on the specific statutes and none of cases AUSA Padis cited had anything to do with issuing visas, providing 'green cards', or taking the 'Oath of Allegiance' after approval of N-400 citizenship applications (see ECF 10-5 which AUSA has ignored in his pleadings in an effort to mislead the court).

AUSA Padis concludes with:

> "[T]he failure to receive discretionary relief," such as a non-immigrant tourist visa, "amount to a constitutionally protected deprivation of a property

10 The full text of DHS OIG complaint referred to is in ECF 30-1.

> or liberty interest." Aguilera v. Holder, 354 F. App'x 882, 884 (5th Cir. 2009) (per curiam). Plaintiffs' constitutional claim cannot prevail.

Aguilera specifically states that it is not precedent and so AUSA Padis is again ignoring the orders of Fifth Circuit in citing it as precedence in an effort to mislead the court that it has any relevance at all. Further, Aguilera is completely irrelevant as it deals with a deportation tribunal's discretion granting an exceptional hardship exemption in a deportation matter with a specific denial of judicial review.[11] The deportation statute, INA 240A(b)(1), has no bearing on visa issuance. Further, the denial of judical review in Aguilera cited specific restrictions on judicial review of the deportation discretionary findings, but specifically allows consitutional claims to be reviewed by the courts (contrary to AUSA Padis' claim above).

AUSA Padis can quote from any source such as Shakespeare's Hamlet, but to cite a 'no precedent' case which has no more relevance than Hamlet without idenitfying the required 'no precedent' status is to mislead the court through false conclusions as well as create needless delay and hinder prompt and just resolution of the matter at hand.

AUSA Padis went on to cite Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) in introducing the offensive (to us) Doctrine of Consular Non Reviewability (DoCNR) but actually Kleindienst is based on the fact that visa acceptance and denial are mandated by statute, not executive discretionary. This issue is discussed

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11 INA 240A(b)(1) is 8 USC § 1229(b) which gives wide discretion to the tribunal to determine 'exceptional and extremely unusual hardship'. Further, INA 242 is 8 USC §1252(a)(2)(B) which states:
Denials of discretionary relief ... no court shall have jurisdiction to review-- (i) any judgment regarding the granting of relief under section ... 1229b … of this title
but (B) is restricted by:
(D) ... Nothing in subparagraph (B) ... which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law

in depth in our Response ECF 18 pages 12 to 13.

AUSA Padis was again using a 'not precedent' case and false and misleading statements to mislead the court and delay the proceedings.

3. Padis AUSA Made Numerous False and Misleading Statements

In AUSA Padis' Background / Summary he wasted space and court's attention by citing irrelevant minor details while carefully omitting the critical elements of the three main causes of action.

Specifically he concealed the 'guaranteed delivery' nature of the label I purchased and exaggerated the delay ('a day late' which is obviously false according to the complaint) while claiming I was seeking 'money back' (which has serious legal challenges of Sovereign Immunity) while I was instead seeking a credit for future services which is supported by the APA. Two false statements in addition to the distortions of omitting important facts to create the illusion that the USPS claim was not valid.

For DoS visa denials AUSA Padis omits the fees for the visa applications and the important needs for the visas. He omits the defects in the visa denials. He also completely omits the most important visa applications of my wife to visit my mom before her death and later when she was stranded in Thailand by USCIS. My wife's visa denial is particularly important as she is a citizen's spouse and, hence, exempted from the DoCNR according to recent decisions.[12] Again omitting critical details while including irrelevant details is indicative of intentional misleading the court to avoid prompt and just resolution of the issues.

12 See which is discussed in detail in our Response ECF 18 pages 13 to 23.Sandra Munoz v. State Department (9th Cir. 2022, 21-55365)

For USCIS, AUSA Padis completely omits the over four years where USCIS unlawfully did not provide my wife with her ten year 'green card', leaving her stranded in Thailand and finally an apparent 'undocumented alien' (a.k.a. an illegal to be deported on day one as they are poisoning the blood of our nation). He also omits the critical decision on 31 Jan 2023 (ECF 10-5, over one year ago) where USCIS approved her ten year green card and citizenship. He talks about all the unlawful actions of USCIS after that approval but never mentions the prior decision which undermines any later actions.

This is most egregious reframing of the actual situation with the clear intention of deceiving the court into leaving my wife as an apparent undocumented alien without the privileges of citizenship contrary to the decision in ECF 10-5. This callous disregard for the fundamental rights of plaintiffs in general should be considered when evaluating the appropriateness of creative sanctions.

I have included a separate affirmation which describes the misleading 'Background' provided by AUSA Padis in full detail in PadisMisleadingSummary.pdf (ECF 39-2).

Conclusion

While is no doubt that AUSA Padis has an overwhelming case load (in common with most other AUSA's and most courts) and must juggle cases, this does not justify false statements to third parties in government emails or false and misleading pleadings both of which waste the time of other parties and cause needless delays in the just and proper resolution of issues.

It is also true that costs are not really applicable in this matter and imprisonment and disbarment are wildly excessive for such common and minor transgressions. As such the court is asked to consider creative sanctions such as community service and early filings.

Of course as community service infringes on AUSA Padis' free time, the court is asked to issue an 'Order to Show Cause' for why the requested sanctions should not be ordered for AUSA Padis.

Respectfully submitted,

Verification of Reply

The Plaintiff hereby affirms under penalty of perjury in both the United States and Thailand that as an individual:

1. I have reviewed the above motion and believe all of the statements to be true to the best of my knowledge.
2. I have reviewed the associated documents and exhibits and believe them to be true and accurate copies with the exception of the documents identified as being redacted. The redacted documents have only been altered to remove sensitive personal information or other redactable information (as cited in the redaction) according to normal redaction procedures.

I hereby reaffirm that the above is true to the best of my knowledge under penalty of perjury in both the United States and Thailand.

/s *Brian P. Carr*
Brian P. Carr
1201 Brady Dr
Irving, TX 75061
Date: 7. Jun. 2024
Location: Irving, Texas

CERTIFICATE OF SERVICE

On the recorded date of submission, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I also hereby certify that on this same date no copies were served via U.S. mail as all parties in this matter were enrolled in the court's electronic case filing (and service) system.

/s *Brian P. Carr*
Brian P. Carr
1201 Brady Dr
Irving, TX 75061

Case, Statute, and Other Index

Subject: Re: Previous Changes to 5th Circuit Rule 47.5.4
From: CA05 Webmaster <Webmaster@ca5.uscourts.gov>
Date: 6/3/2024, 12:23 PM
To: Brian Carr <carrbp@gmail.com>

Good Afternoon Mr. Carr,

The change you identify to Rule 47.5.4 took place in the fall of 2006. The change was posted for public comment, the comment period ended August 15, 2006. The court voted to adopt the change in September of 2006 and it went into effect December 1, 2006.

I hope this answers your question.

Very Respectfully,

Margaret H. Dufour
Webmaster/CM/ECF Help Desk
US Fifth Circuit Court of Appeals
504-310-7655

From: Brian Carr <carrbp@gmail.com>
Sent: Monday, June 3, 2024 8:12 AM
To: CA05 Webmaster <Webmaster@ca5.uscourts.gov>
Subject: Previous Changes to 5th Circuit Rule 47.5.4

CAUTION - EXTERNAL:

Hi,
Thanks for your help with this. I found the most recent changes to Rule 47.5.4 in

https://www.txnd.uscourts.gov/sites/default/files/documents/LocalRuleChanges22.pdf
but it did not have the change I was looking for.
5th Circuit Rule 47.5.4 removed 'An unpublished opinion may, however, be persuasive. ' In 2001 I found a copy of the rules which included that phrase, but current rules do not.

Is there a link to the previous changes? I would be happy to search through the miscellaneous files (21 is not too many for manual searches). Thanks again for your help with this.
Brian

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

Brian P. Carr, Rueangrong Carr, and Buakhao Von Kramer Plaintiffs versus United States, US Department of Justice, USPS, USPS OIG, USPS BoG, US CIGIE, Department of State, Department of State OIG, USCIS, DHS OIG, and SSA Defendants	Civil No. 3-23CV2875 - S Affirmation Demonstrating AUSA Padis Misleading Summaries Justify False Conclusions

Affirmation Demonstrating
AUSA Padis Misleading Summaries Justify False Conclusions

AUSA Padis summarizes by selectively including minor details which were included for context only and completely omitting the important and relevant facts. When just citing minor details is not enough to mislead the court, AUSA Padis even gets the unimportant details wrong causing further confusion. These false and misleading restatements are then used to reach false conclusions.

I have broken the summaries of AUSA Padis into sections adjusting their external references to be consistent and clear. After each AUSA Padis section I have made an accurate summary of the same claims to demonstrate how unimportant details are cited while important statements are omitted.

AUSA Padis Misstates Department of State Claim

AUSA Padis states:

> Plaintiff Brian Carr is a U.S. Citizen who married Plaintiff Rueangrong Carr in Thailand and petitioned, as her spouse, for her to receive lawful-permanent-resident status in the United States (commonly known as a green card), which was expedited and approved within four months' time. (ECF 1 para 60, 74).
>
> Plaintiff Von Kramer is Mrs. Carr's sister, and in 2019, she desired to travel to the United States. (ECF 1 para 90). But her request for a non-immigrant tourist visa was initially denied; however, her fourth application for a visa was granted in 2022 (about three years later). (ECF 1). Plaintiffs allege they complained to the State Department's Office of Inspector General (OIG) about the challenges Von Kramer encountered in attempting to obtain a visa, but the OIG refused to report or investigate allegations of (what Plaintiffs allege constituted) various federal crimes. (ECF para 125-39).

I would instead summarize this claim with:

> Mr. Carr, a U.S. citizen, married Mrs. Carr in Thailand in 2018 and applied for an immigration visa. On learning that there was an expected one year delay for his wife's visa and his mother likely would not survive until then, he applied for non immigration visa ($160 fee) so that his wife could meet his mother. This visa application was denied without Due Process with a form letter citing INA 214(b) but no reference to the evidence considered. Mr. Carr complained to the DoS OIG of the denial without Due Process but the matter was referred to BCA which took no action to correct the deficiency.
>
> Mrs. Von Kramer in 2019 applied three times for a non-immigrant visa so that she could receive her Social Security Surviving Spouse benefits but they were all denied with the same form letter and no Due Process.
>
> In 2022 Mrs. Carr was unlawfully stranded in Thailand by USCIS and she and Mrs. Von Kramer applied for non-immigrant visas which were granted allowing Mrs. Von Kramer to start receiving Social Security benefits.

AUSA Padis Misstates USCIS Claim

AUSA Padis states:

> In 2022, Plaintiff Rueangrong Carr applied for naturalization. ECF 1 para 204. At her scheduled naturalization interview, she initially was unable to write a sentence in English and failed the government and history (civics) portions of the naturalization test. ECF 1 She was then scheduled for another interview to retake those portions of the naturalization test, but she did not show up - resulting in the denial of her naturalization application. ECF 1 It appears that Mr. and Mrs. Carr had a previously scheduled international vacation that conflicted with the scheduled interview, ECF 1 para 194, but their request to reschedule the interview was denied, ECF 1 para 197.

I would instead summarize this claim with:

> In 2020 Mrs. Carr submitted the mandatory I-751 application for a ten year green card but it was unlawfully delayed with an extension that expired in 2022. In 2022 she also submitted an N-400 application for citizenship. On 31 Jan 2023 USCIS notified her that both her I-751 and N-400 were approved (ECF 10-5) but USCIS unlawfully did not provide her with a 10 year green card or schedule the Oath of Allegiance for her to become a citizen. USCIS has unlawfully left her as an apparent 'undocumented alien' (a.k.a. an 'illegal') at a time when there is pending Texas SB4 for vigilantes to deport just such 'illegals' without Due Process. USCIS is also unlawfully denying Mrs. Carr her rights as a U.S. citizen.

AUSA Padis Misstates USPS Claim

AUSA Padis states:

> In addition, Mr. Carr in 2021 purchased overnight shipping from the USPS to deliver his passport from the Thai Embassy in Washington, D.C. to his home in Irving, Texas. (ECF 1 para 27). **The package allegedly arrived a day late**, and now **Mr. Carr wants his money back**.[1] (ECF 1) Mr. Carr complained to his Congressman, who allegedly had been informed that a refund had been paid. ECF 1 para 37-38. Plaintiffs now complain that the USPS official who reported the refund to Mr. Carr's Congressmen had been misled by "numerous falsified documents." ECF 1 para 39.

Two claims above have been highlighted (bold) as they each are false. The first makes it appear that mailing was not 'guaranteed delivery' which grants a refund of the purchase price if the precise delivery time is not met. The second changes a credit for money back (which is what is sought) to 'money back' which is generally not admissible under sovereign immunity.

I would instead summarize this claim with:

> In 2021 Mr. Carr purchased a 'click-n-ship' label with 'Guaranteed Delivery' for, in this case, 12 noon on 15 Apr 2021. The package arrived a few minutes late entitling him to a refund to his credit card of $26.35, but the driver had improperly scanned the package as delivered at 11:35am while the driver was still at the Post Office, an extraordinarily common problem (USPS OIG 2017 audit, ECF 18-7). The falsified delivery time delayed Mr. Carr's application for a refund and may have contributed to the fact that while the appeal showed 'Dispute Paid' no credit has ever posted to his account.

1 I added the Bold to highlight the two false statements by AUSA Padis.

AUSA Padis Misstates Ancillary Relief

AUSA Padis states:

> Plaintiffs allegedly notified various government agencies including the U.S. Department of Justice about the circumstances of their challenges in obtaining a visa for Plaintiff Von Kramer, naturalization for Mrs. Carr, and timely delivery (or a refund) of a package for Mr. Carr. See, e.g., ECF 1 para 248-53. But to date, the federal government has not taken (in Plaintiffs' view) appropriate or timely action to correct allegedly inaccurate records and fix supposedly broken systems (such as USCIS's automated phone system). See ECF 1 reliefs 27-47, 49-53 ("USCIS must immediately disable hang ups by the automated phone system and instead fail over to a human representative.").

I would instead summarize this claim with:

> As each of the primary agencies, USPS, DoS, and USCIS have plausibly falsified government records, Mr. Carr has complained to USPS OIG, USPS BoG, DoS OIG, DHS OIG, and CIGIE about these federal crimes and asked that the plausible allegations of federal crimes be reported to the DoJ as mandated in the IG Act of 1978. It appears that none of complaints were forwarded to the DoJ and when they were reported directly to DoJ, DoJ did not fulfill its mandate to 'uphold the law'. For plausible allegations of federal crimes this minimally requires the DoJ to refer the matter another party and monitor the result to insure that future violations do not occur and the injured parties get appropriate redress when possible.

Conclusion

AUSA Padis also added the incorrect adverb of 'allegedly' in numerous locations but as the Amended Complaint is Verified it should have been 'affirmed under penalty of perjury'. To call such statements allegations is false.

It is clear that AUSA Padis selected minor details which were included in the Complaint for context and omitted the central facts in order to mislead the court. AUSA Padis has been aware of the critical USCIS Notice and Decision of 31 Jan 2023 since 3 Mar 2024 when I sent him a copy and informed him of my wife's plight, but at no time has AUSA Padis addressed that certified USCIS document (ECF 10-5) in any pleading to the court.

The AUSA Padis later broad and conclusory claims (lacking any specificity) after this false and misleading summary are themselves false ignoring the critical elements of each claim to reach the false conclusions.

Mr. Carr hereby affirms under penalty of perjury in both the United States and Thailand that as an individual:

1. I have reviewed the above affirmation and believe all of the statements to be true to the best of my knowledge.
2. I have reviewed the associated documents and exhibits and believe them to be true and accurate copies with the exception of the documents identified as being redacted. The redacted documents have only been altered to remove sensitive personal information or other redactable information (as cited in the redaction) according to normal redaction procedures.

I hereby reaffirm that the above is true to the best of my knowledge under penalty of perjury in both the United States and Thailand.

/s *Brian P. Carr*

_____

Brian P. Carr
1201 Brady Dr
Irving, TX 75061
Date: 7. Jun. 2024
Location: Irving, Texas

Gmail **Brian Carr <carrbp@gmail.com>**

OIG Hotline - Customer Receipt Letter, H20231749

1 message

DoS OIG INV (no reply) <noreply@stateoig.gov> Wed, Apr 19, 2023 at 1:52 PM
Reply-To: noreply@stateoig.gov
To: carrbp@gmail.com

Dear Mr. Brian Carr,

We are writing regarding the complaint that you submitted to the Office of Inspector General for the U.S. Department of State. We have reviewed your complaint and determined that the appropriate office to address your concerns is the Bureau of Consular Affairs, Executive Office, and the Department of Homeland Security, Office of Inspector General. Your information has been forwarded to each office.

The OIG will take no further action on your complaint. If you have questions, please contact the Bureau of Consular Affairs, Executive Office, and the Department of Homeland Security, Office of Inspector General, using reference number H20231749. We cannot provide telephone numbers or email addresses for the Executive Office, but you may send a letter to:

U.S. Department of State
Bureau of Consular Affairs
Office of the Executive Director
SA-17, 7th Floor
Washington, DC 20522-1707
United States

U.S. Department of Homeland Security
DHS Office of Inspector General/MAIL STOP 0305
Attn: Office of Investigations - Hotline
245 Murray Lane, SW
Washington, DC 20528-0075

Thank you for bringing this matter to our attention.

Sincerely,

U.S. Department of State
Office of Inspector General
Hotline Staff

==========

OFFICIAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

Brian P. Carr, Rueangrong Carr, and Buakhao Von Kramer Plaintiffs versus United States, US Department of Justice, USPS, USPS OIG, USPS BoG, US CIGIE, Department of State, Department of State OIG, USCIS, DHS OIG, and SSA Defendants	Civil No. 3-23CV2875 - S Plaintiffs' Response Opposing Motion to Strike (ECF 37)

Response Opposing Motion To Strike

Table of Contents

I. Backgound - Motion for Partial Summary Judgment (MfPSJ) Valid

A. Mrs. Carr's Citizenship Approved, Left as an Apparent 'Illegal'

On 31 Jan **2023** (ECF 10-5, over one year ago) USCIS approved my wife's ten year green card and citizenship.[1] However, USCIS has left my wife in dire straits with no documentation of her legal status[2] and an apparent 'undocumented alien' (a.k.a. an 'illegal'). She has had realistic fears of being deported at any time by ICE (she doesn't trust U.S. immigration), vigilantes (under Texas SB4), or National Guardsmen (on day one to deport millions of illegals who are poisoning the blood of our nation).

B. Previous MfPSJ Denied Without Full Deliberation, Not on the Merits

On 28 Mar 2024 I submitted a previous MfPSJ (ECF 18) but it was denied on 22 Apr 2024 (ECF 26) based on an improper 56(d) Motion submitted on 17 Apr 24 (ECF 22) but before I could submit my objections to the statutory basis for 56(d) motions as well as other challenges to the Rule 56 Response on 22 Apr 24 (ECF 28)[3].

C. Local Rule 56.2(b) Restriction Not Appropriate

As the previous MfPSJ was not denied on the merits. The application of Local Rule 56.2(b) to this motion is not appropriate.

---

1 USCIS ECF 10-5 states: We have approved your I-751, Petition to Remove Conditions on Residence. Our records also indicate we have approved your Form N-400 Application for Naturalization. Because we also approved your N-400, you will not receive a new Permanent Resident Card (also known as a Green Card). Instead, once you have taken the Oath of Allegiance, you will receive a Certificate of Naturalization, which will be proof of your U.S. citizenship.

2 All previous USCIS documents of lawful permanent resident status had expired, see ECF 24-1, 18-6, 20-2.

3 AUSA Owen called out an interesting discrepancy on the date of filing. It appears that the ECF server date stamps documents based on GMT while most deadlines provided by the court are generally midnight CST or CDT (GMT does not have the confusion of daylight savings time or different time zones). However, as I often submit documents in the evening, they are often date stamped the next day. For ECF 28 it was submitted at 7:55PM CST 22 Apr 2024.

D. Order to Show Cause to Defendants to Address Actual MfPSJ

While normally Motions for Summary Judgment are after discovery, it is also true that select issues can be resolved earlier to simplify the case as well as to provide time critical relief.

Defendants' opposition to this MfPSJ is vague and general and does not meet the statutory or case law standards of specificity. However, default judgments are an anathema to due process so an Order to Show Cause could be appropriate for the Defendants to address their concerns with the details of this specific MfPSJ.

II. Legal Standards

A. Local Rule 56.2(b)

This rule enables courts to "regulate successive motions that are filed after the court has devoted time and effort to deciding an initial motion" and disallows movants from having a "second bite at the apple." Home Depot U.S.A. v. Natl. Fire Ins. Co. of Hartford, Civil Action No. 3:06-CV-0073-D (N.D. Tex. Sep. 10, 2007)

However, there was no 'first bite' as the prior MfPSJ was denied before I had a chance to file the Reply supporting the previous MfPSJ (ECF 28)[4] and the fact that the court did not address USCIS approving my wife's citizenship but then instead making her an apparent 'illegal alien' in these most troubling times.

Further, as the basis for the MfPSJ is four documents from USCIS already in the record, the lack of specificity in Defendants' FRCP Rule 56 Response Affidavit should be addressed by the court before any decision based on the merits of the

4 See Local Rule 7.1 below for an explanatoin of why it was timely.

MfPSJ itself.

B. Local Rule 7.1, Reply to Previous MfPSJ was Timely

Local Rule 7.1 states: ...

> (e) Time for Response and Brief. A response and brief to an opposed motion must be filed within 21 days from the date the motion is filed.
> (f) Time for Reply Briefs. Unless otherwise directed by the presiding judge, a party who has filed an opposed motion may file a reply brief within 14 days from the date the response is filed.

As I had 14 days to Reply to the MfPSJ and 21 days to Respond to the improper 56(d) Motion, the filing in 5 days was certainly timely. Further, while it was filed just under ten hours after the Order, I had been working on the document for 5 days and only became aware of the Order minutes before I filed the document. See ECF 32 pages 3 and 4. Truth to tell, I was put into a tizzy by the Order while I still had plenty of time and after I had put together a proper Reply. I filed ECF 28 without too much thought or research.

C. FRCP Rule 12 Motion to Strike

FRCP Rule 12 states:

> (f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act

As this is the 2nd MfPSJ concerning the same subject matter (this MfPSJ is somewhat reduced to focus on a single issue) it could certainly be viewed as redundant but Local Rule 56.2(b) would be a much more appropriate vehicle for denying the MfPSJ.

D. Doctrine of Consular Non Reviewability (DoCNR)

As we intend to expand on existing challenges to the offensive (to us) Doctrine of Consular Non Reviewability (DoCNR) raised by USATXN relying on Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (citizen rights can bypass DoCNR), Patel v. Reno, 134 F.3d 929, 121 F.3d 1277 (9th Cir. 1997) (APA may override DoCNR), and Sandra Munoz v. State Department (9th Cir. 2022, 21-55365) (spouse of citizen is an exception to DoCNR) it is likely that this case will be appealed to the Fifth Circuit Court and it is plausible that it might be heard by the U.S. Supreme Court.

As most pleadings which I have submitted refer to several other pleadings, to have a pleading stricken would make preparing the record for appeal problematic. The MfPSJ referred to in this Motion to Strike would not necessarily be part of the record and the appelate court could not adequately evaluate this Motion to Strike.

The court is asked that Judge Scholer make the decision so that with the likely appeal all the decisions appealed will be from the same Judge (a matter of preference rather than right).

III. Argument and Authorities

A. Defendants Did Not Meet FRCP 56(d) Requirements

1. Cited Case Does Not Support FRCP 56(d) Delay Herein

In the widely cited Areizaga v. ADW Corp., No. 3:14-cv-2899-B (N.D. Tex. Jun. 28, 2016) this court found:

> FRCP Rule 56(d) is "designed to safeguard against a premature or improvident grant of summary judgment." Washington v. Allstate Ins. Co., 901 F.2d 1281, 1285 (5th Cir. 1990). To justify a continuance, the Rule

> 56(d) motion must demonstrate (1) why the movant needs additional discovery and (2) how the additional discovery will likely create a genuine issue of material fact. See Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518, 534-35 (5th Cir. 1999) …
>
> The nonmovant, however, must "present specific facts explaining his inability to make a substantive response ... and specifically demonstrating how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact" and defeat summary judgment. Washington, 901 F.2d at 1285 ... (construing former FED. R. CIV. P. 56(f)). The nonmovant "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts." Raby, 600 F.3d [552] at 561 (quoting SEC v. Spence & Green Chem. Co., 612 F.2d 896, 901 (5th Cir. 1980)). "Rather, a request to stay summary judgment under [Rule 56(d)] must 'set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist and indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion.'" Id. (quoting C.B. Trucking, Inc. v. Waste Management Inc., 137 F.3d 41, 44 (1st Cir. 1998)). The party requesting the additional discovery or extension also must show that relevant discovery has been diligently pursued. See Wichita Falls Office Assocs. v. Banc One Corp., 978 F.2d 915, 919 (5th Cir. 1992). "If it appears that further discovery will not provide evidence creating a genuine issue of material fact, the district court may grant summary judgment." Raby, 600 F.3d at 561 (quoting Access Telecom, Inc. v. MCI Telecomm. Corp., 197 F.3d 694, 720 (5th Cir. 1999)).

2. Required Rule 56(d) Response Affidavit is Inadequate

However, a review of the required FRCP Rule 56(d) Response Affidavit (ECF 38) reveals nothing specific to this Complaint with only:

> 4. ... Defendants intend to seek discovery to respond to the allegations in the complaint (or the contemplated amended complaint)[5], including serving written discovery on each Plaintiff and taking the depositions of each Plaintiff. Defendants may need to rely upon an administrative record, which has not yet been assembled or filed in this case.
> 5. Completing the above-mentioned discovery is necessary to fully respond to the assertions that Plaintiffs rely upon in their motion.
> 6. Defendants cannot at this time present facts essential to justify its opposition to Plaintiffs' motion.

From Areizaga above:

> The party requesting the additional discovery or extension also must show that relevant discovery has been diligently pursued. See Wichita Falls Office Assocs. v. Banc One Corp., 978 F.2d 915, 919 (5th Cir. 1992). "If it appears that further discovery will not provide evidence creating a genuine issue of material fact, the district court may grant summary judgment." Raby, 600 F.3d at 561 (quoting Access Telecom, Inc. v. MCI Telecomm. Corp., 197 F.3d 694, 720 (5th Cir. 1999)).

It is important to note that when the current MfPSJ was filed, Defendants had had over 120 days to prepare their response and over 70 days since I explicitly told AUSA Padis of my wife's plight and provided him with the critical ECF 10-5 which USATXN has scrupulously ignored in all pleadings. My wife had her citizenship approved by USCIS well over a year ago but then was left as an apparent 'illegal alien' for over 4 months while USATXN ignored the documents provided and her plight.

3. Plaintiffs Offered Opportunity for Deposition, Declined by Defendants

In ECF 30-1, an email thread, there is an email from myself at 'April 25, 2024

5 At this time I don't anticipate any Amended Complaints until after Defendants are working on an actual Answer. The only changes expected at this time are typographical or clerical, e.g. two Count 8's but no Count 9. If Defendants are amenable, this Amended Complaint could be worked on as a shared document in parallel with the Answer as I imagine it is easier to Answer a Complaint that is free of typographical and clerical errors.

12:29 PM', where we offered to give both USATXN representatives the opportunity to depose all three of us and we would bring lunch and share (not intended as any form of bribe, but just friendly courtesy). At that time there was no interest in any insights we could provide around those four documents or my wife's plight.

IV. Conclusion

While it certainly is unusual to request relief via a MfPSJ before discovery, my wife's plight justifies some consideration especially as the evidence and relief are so simple. The evidence on which this relief is sought is just four documents provided by USCIS and which are in the record with certified copies.

If after reviewing the context for these documents via the relevant affirmed statements from the now Verified Amended Complaint, the court is not comfortable granting the relief sought (as default judgments are always questionable), we request that the court issue an Order to Show Cause to Defendants to produce contrary arguments or specific inquiries they require before the requested relief is provided.

Respectfully submitted,

Verification of Reply

The Plaintiff hereby affirms under penalty of perjury in both the United States and Thailand that as an individual:

1. I have reviewed the above motion and believe all of the statements to be true to the best of my knowledge.
2. I have reviewed the associated documents and exhibits and believe them to be true and accurate copies with the exception of the documents identified as being redacted. The redacted documents have only been altered to remove sensitive personal information or other redactable information (as cited in the redaction) according to normal redaction procedures.

I hereby reaffirm that the above is true to the best of my knowledge under penalty of perjury in both the United States and Thailand.

/s *Brian P. Carr*
Brian P. Carr
1201 Brady Dr
Irving, TX 75061
Date: 9. Jun. 2024
Location: Irving, Texas

CERTIFICATE OF SERVICE

On the recorded date of submission, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I also hereby certify that on this same date no copies were served via U.S. mail as all parties in this matter were enrolled in the court's electronic case filing (and service) system.

/s *Brian P. Carr*
Brian P. Carr
1201 Brady Dr
Irving, TX 75061

Case, Statute, and Other Index

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BRIAN P. CARR, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	Civil Action No. 3:23-CV-02875-S-BT

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

A. Plaintiffs have failed to show an unequivocal waiver of sovereign immunity.

In response to Defendants' assertion of sovereign immunity over all claims for nonmonetary relief, Plaintiffs call Defendants' argument "unfounded" and point to their response to Defendants' first motion to dismiss. (Doc. 34, at 3). In that earlier response, Plaintiffs provide a narrative history of sovereign immunity, with no citations or support, and claim the APA provides a waiver for their claims. In citing the APA, Plaintiffs appear to argue it provides a sweeping waiver for sovereign immunity in all circumstances where a plaintiff takes issue with agency action and seeks relief other than money damages. (Doc. 18 at 4). But in reality, the limited waiver applies only to "actions against federal government agencies, seeking nonmonetary relief, if the agency conduct is otherwise subject to judicial review." *Alabama-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 488 (5th Cir. 2014). This limited waiver is subject to

significant exceptions. These include, but are not limited to, actions committed to agency discretion or where there is another adequate remedy available to the complaining party. 5 U.S.C. §§ 701(a)(2), 704. And it is a plaintiff's burden to adequately identify an "unequivocal waiver of sovereign immunity." *Freeman v. United States*, 556 F.3d 326, 334 (5th Cir. 2009). Plaintiffs cite to no authority demonstrating the numerous actions taken by various agencies of which they complain were the sort of non-discretionary actions contemplated by the APA. Further, as explained in greater detail below, an adequate statutory remedy regarding the denial of Mrs. Carr's N-400 application exists, depriving the Court of jurisdiction under any other statute. Plaintiffs therefore have not met their burden, and Plaintiffs' claims for nonmonetary relief should be dismissed for lack of jurisdiction.

B. The Court lacks jurisdiction over the late-delivery claim against the USPS.

The federal government retains sovereign immunity from "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 485 (2006). Here, because Plaintiffs' claim regarding USPS concerns an allegedly late-delivered package, it arises out of the allegedly "negligent transmission of letters or postal matter" such that the federal government retains sovereign immunity. *See id.*

Plaintiffs argue the Supreme Court's decision in *Dolan* "clearly indicates that [Plaintiffs] could seek a refund for 'Guaranteed Delivery'." (Doc. 34, at 7). But they fail to explain this assertion. Indeed, *Dolan* involved a personal injury claim filed after a person was injured by tripping over a package that was allegedly negligently placed by a

postal worker. *Dolan*, 546 U.S. at 483. The Supreme Court ultimately determined that a personal injury claim arising out of the placement of packages did not constitute negligent transmission of postal matter, so sovereign immunity was waived. *Id*. at 492. In making this decision, the Court noted Congress intended to retain immunity for "injuries arising, directly or consequentially, because mail either fails to arrive at all or arrives late, in damaged condition, or at the wrong address." *Id*. at 489. Plaintiffs' claims related to a late-delivered package thus fall squarely within the exception to the FTCA's waiver. And while Plaintiffs attempt to draw a distinction between requesting money damages directly versus indirectly through a "credit for future services," they cite to no authority demonstrating how this distinction reaches any waiver of sovereign immunity. (Doc. 34, at 7). Plaintiffs' claims concerning the alleged one-day delayed delivery of Mr. Carr's package should be dismissed for lack of jurisdiction.

C. The naturalization statute provides an adequate remedy of which Plaintiffs have not availed themselves, requiring dismissal of Plaintiffs' naturalization-related claims.

Jurisdiction would be unavailable under any other federal statute or doctrine for Plaintiffs' naturalization-related claims because the naturalization statute provides an adequate remedy already. Under 8 U.S.C. § 1421(c), "[a] person whose application for naturalization under this subchapter is denied, after a hearing before an immigration officer under section 1447(a) of this title, may seek review of such denial before the United States district court for the district." Moreover, judicial review under section 1421(c) "shall be de novo, and the court shall make its own findings of fact and conclusions of law and shall, at the request of the petitioner, conduct a hearing de novo

on the application."

Plaintiffs claim they have availed themselves of this remedy by adding an alternative request for de novo review under section 1421(c) to their amended complaint. (Doc. 34, at 7). But they have skipped a mandatory procedural step. Section 1421(c) confers jurisdiction "*after* a hearing before an immigration officer under section 1447(a)." 8 U.S.C. § 1421(c) (emphasis added). Section 1447(a) provides that after the denial of a naturalization application, an applicant may request a hearing before an immigration officer. 8 U.S.C. § 1447 (a). Plaintiffs never sought such a hearing. (*See* Doc. 29, 24-30). Because Plaintiffs never sought or attended such a hearing, section 1421(c) does not confer jurisdiction. *See Aparicio v. Blakeway*, 302 F.3d 437, 440 (5th Cir. 2002) ("[a]pplicants may only appeal to the district court however, if they either sought administrative review and the application was again denied, or if they sought administrative review and the review as delayed for more than 120 days."); *and see Huang v. Napolitano*, No. 10-22580-Civ, 2011 WL 772755 at *2-3 (S.D. Fla Feb. 28, 2011).

Because the naturalization statute provides "an adequate remedy to challenge any alleged delay in the adjudication of his naturalization application," it precludes judicial review under any other federal statute that could possibly provide jurisdiction, including the APA. *See, e.g.*, *Tankoano v. U.S. Citizenship & Immigr. Servs.*, 652 F. Supp. 3d 812, 818 (S.D. Tex. 2023).

D. Plaintiffs' visa-related claims also fail to state a claim.

Plaintiffs argue their claims regarding Mrs. Von Kramer's alleged delays in

obtaining a non-immigrant visa state a Due Process claim because there is "no basis for [an] executive discretion challenge" and because the doctrine of consular nonreviewability is "not applicable". (Doc 34, at 9-10) (cleaned up).

Initially, it is unclear what Plaintiffs are referring to as an "executive discretion challenge." In explaining why Plaintiffs' claims related to non-immigrant tourist visas fail to state a constitutional claim, Defendants noted that to state such a claim, a plaintiff must first identify a protected liberty or property interest and then show that the government deprived him of that interest without due process. (Doc. 31, at 7); *and see Mendias-Mendoza v. Sessions*, 877 F.3d 223, 228 (5th Cir. 2017). Plaintiffs have failed to identify such a protected interest. *See Smith v. U.S. Dep't of Homeland Sec.*, No. 3:21-cv-02694-E, Doc. 21 (N.D. Tex. Apr. 13, 2022) (citing *Nyika v. Holder*, 571 F. App'x 351, 352 (5th Cir 2014) & *Ohiri v. Gonzales*, 233 F. App'x 354, 356 (5th Cir. 2007)) (holding that "[b]ecause [the plaintiff] has no liberty interest in an adjustment of status, he has failed to state a claim for a due process violation"); *Bemba v. Holder*, 930 F. Supp. 2d 1022, 1029 (E.D. Mo. 2013) (dismissing the plaintiff's Fifth Amendment due process claim based on the government's delayed adjudication of a Form I-485 application, because there is no constitutionally protected liberty interest in adjustment of status). "[T]he failure to receive discretionary relief," such as a non-immigrant tourist visa, does not "amount to a constitutionally protected deprivation of a property or liberty interest." *Aguilera v. Holder*, 354 F. App'x 882, 884 (5th Cir. 2009) (per curiam) (citing *Assad v.*

Ashcroft, 378 F.3d 471, 475 (5th Cir. 2004).[1]

Pointing to the Ninth Circuit's decision in *Muñoz v. Dep't. of State* (50 F.4th 906 (9th Cir. 2022)), Plaintiffs appear to argue they hold a protected interest in Ms. Von Kramer's non-immigrant tourist visa. However, *Muñoz* involved an immigrant-relative petition and related immigrant visa application. *Muñoz*, 50 F.4th at 910. It is therefore inapplicable to Plaintiffs' claims, and Plaintiffs' constitutional claim cannot prevail.

Plaintiffs also seek to challenge the doctrine of consular nonreviewability based on *Muñoz*. Particularly, they argue it "opens the door to ancillary review of the entire visa process." (Doc. 34, at 10). Initially and as discussed above, *Muñoz's* holdings related to immigrant-relative petition and related immigrant visa application are not applicable to non-immigrant tourist visas. Further, in the Fifth Circuit, "the denial of visas to aliens is not subject to review by the federal courts." *Centeno v. Shultz*, 817 F.2d 1212, 1213 (5th Cir. 1987). As such the Court lacks jurisdiction to review any decisions by the consular officer in Thailand denying Mrs. Von Kramer's applications for a visa, whether constitutional or statutory.

II. Conclusion

Because Plaintiffs fail to identify a waiver of sovereign immunity that could possibly justify the sweeping non-monetary relief they seek for the alleged constitutional violations, the Court should dismiss Plaintiffs' entire amended complaint without

[1] Plaintiffs also suggest Defendants' citing of *Aguilera*, an unpublished opinion, is sanctionable. But the Fifth Circuit specifically allows parties to cite to unpublished opinions. 5th Cir. R. 47.5.4. And although "[a]n unpublished opinion… is not controlling precedent," it "may be persuasive authority." *Butler v. S. Porter*, 999 F.3d 287, 296 n.4 (5th Cir. 2021).

prejudice. Even so, the Court lacks jurisdiction over each claim because the USPS retains sovereign immunity from tort claims arising from late-delivered packages, the naturalization statute provides adequate remedies for the naturalization-related claims, and the consular nonreviewability doctrine precludes jurisdiction for the visa-related claims. Plaintiffs also fail to state a claim for violation of constitutional due process. For all of these reasons, Plaintiffs' entire amended complaint should be dismissed.

Dated: June 11, 2024

Respectfully submitted,

LEIGHA SIMONTON
UNITED STATES ATTORNEY

/s/ Emily H. Owen
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Attorneys for Defendants

CERTIFICATE OF SERVICE

On June 11, 2024, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

s/ Emily H. Owen
Emily H. Owen
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

Brian P. Carr, Rueangrong Carr, and Buakhao Von Kramer Plaintiffs versus United States, US Department of Justice, USPS, USPS OIG, USPS BoG, US CIGIE, Department of State, Department of State OIG, USCIS, DHS OIG, and SSA Defendants	Civil No. 3-23CV2875 - S Plaintiffs' Reply Supporting Motion to Reconsider (ECF 32)

Reply Supporting Motion To Reconsider

Table of Contents

I. Background

A. Several Motions Considered

ECF	Date	
15	08 Mar 24	Defendants' Motion to Dismiss
18	28 Mar 24	Plaintiffs' Response to ECF 15, Motion to Dismiss Motion For Partial Summary Judgment Motion to Amend Complaint
20	05 Apr 24	Plaintiffs' Certificate of Conference, Motion to Amend UNOPPOSED
21	08 Apr 24	Defendants' Certificate of Conference, Motion to Amend UNOPPOSED
22	17 Apr 24	Defendants' Response to Plaintiffs' to Motion for Partial Summary Judgment (ECF 18), Defendants' 56(d) Motion for Continuance (ECF 18)
23	17 Apr 24	Defendants' 56(d) Affidavit
26	22 Apr 24	Magistrate RR Order Resolving Pending Motions
28	23 Apr 24	Plaintiff First Amended Complaint
29	23 Apr 24	Plaintiff Reply to Motion For Partial Summary Judgment and Response to Defective 56(d) Motion
32	14 May 24	Plaintiffs' Motion to Reconsider
36	04 Jun 24	Defendants' Response Opposing Motion To Reconsider

B. AUSA Padis Attempted Delay Through Proof of Service

AUSA Padis believed that there was improper service as USATXN records showed (incorrectly) that service had been made by myself, a Plaintiff in this matter. While there had been timely and adequate notice as required by due process, AUSA Padis contacted me via email and offered to accept service if I emailed him a copy of the summons and complaint. He also stated incorrectly that there were no records of service while in fact there were records of improper service (and, hence, timely and adequate notice).

I provided AUSA Padis with the requested summons and complaint as well as the

proof of service which showed service was provided by Mr. Joubert (who is over 18 and not a party to this suit) so AUSA gave up on his scheme to get an almost 60 day delay from an unnecessary letter of accepted service.[1] AUSA made a timely response which he could have done without wasting time over the incorrect USATXN records of improper service.

C. AUSA Padis Knew of Plight and Dire Circumstances of Mrs. Carr

When I provided AUSA Padis with the requested summons and complaint I also told him of my wife's plight and dire circumstances. I provided him with a copy ECF 10-5 where USCIS approved my wife's ten year green card and citizenship over a year ago.[2] However, USCIS has left my wife in dire straits with no citizenship and no documentation of her legal status and an apparent 'undocumented alien' (a.k.a. an 'illegal').[3] She has had realistic fears of being deported at any time by ICE (she doesn't trust U.S. immigration), vigilantes (under Texas SB4), or National Guardsmen (on day one to deport millions of illegals who are poisoning the blood of our nation).

D. AUSA Padis' Motion to Dismiss (ECF 15) False and Misleading

AUSA Padis Motion to Dismiss was shoddy making broad challenges lacking specificity and that were spurious and specious. The most egregious example might be claiming a failure to state a claim but then completely omitting my wife's plight. At no time has USATXN admitted the existence of ECF 10-5.

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1 This apparent attempt to delay is discussed at length in ECF 30, 9 May 2024, my Motion for Sanctions which is pending at this time.

2 USCIS ECF 10-5 states: We have approved your I-751, Petition to Remove Conditions on Residence. Our records also indicate we have approved your Form N-400 Application for Naturalization. Because we also approved your N-400, you will not receive a new Permanent Resident Card (also known as a Green Card). Instead, once you have taken the Oath of Allegiance, you will receive a Certificate of Naturalization, which will be proof of your U.S. citizenship.

3 All previous USCIS documents of lawful permanent resident status had expired, see ECF 24-1, 18-6, 20-2.

In Argument E AUSA Padis claimed the entire suit was frivolous based on allegations that the Plaintiffs 'infer conspiracy and false documents from administrative delays' which on later discussions with USATXN does not apply to anything in the complaint. There are no occurrences of 'conspir' (any of that family of words) in the complaint and while there are numerous complaints of false documents in no case are they inferred from administrative delays. However, to counter such broad claims is challenging and the response was rather lengthy as a result.

E. Lengthy Response (ECF 18) to MTD (ECF 15)

Included Motion for Partial Summary Judgment (MfPSJ) and

Motion to Amend Complaint

I apologize to the court that ECF 18 was long and did not have a Table of Contents or Index of Cases and Statutes. However, the shoddy MTD required a lengthy response explaining three primary causes of action and nine counts. It also included the explanation of my wife's dire situation and seeking relief (MfPSJ).

There was also a very minor Motion to Amend the Complaint with correcting typographical and clerical errors and adjusting some of the allegations to conform to the evidence (based on redacted affirmations which had not been prepared previously).

F. Dispute Over Whether Motion to Amend Moots All Motions

AUSA Padis told me that USATXN not opposing the Motion to Amend would moot all pending motions which was not my understanding of the law or local rules. Dual Certificates of Conference were submitted ECF 20 and ECF 21. The mooting of pending motions was contrary to my understanding of this court's prior

decisions on this matter as in ROUNTREE v. DYSON (2018, 5th Circuit 17-40443) and Chief Judge Fitzgerald in Davis v. Dallas County, Tex., 541 F. Supp. 2d 844 (N.D. Tex. 2008) as cited in the above 2nd Circuit decision.

G. AUSA Padis Submitted Response Opposing MfPSJ (ECF 22)

56(d) Motion for Continuance (ECF 22)

AUSA Padis' challenges to the MfPSJ did not address my wife's dire situation as an apparent 'illegal alien' but only talked about it being earlier than normal and only raised general complaints about not being prepared to challenge the MfPSJ. At no time did he mention the four 4 USCIS documents that were the basis of the claim or the relief sought.

In a footnote AUSA Padis explained that he did not Reply supporting the MTD as he had agreed to the Amended Complaint and would resubmit the MTD for the Amended Complaint.

H. Order Resolved All Pending Motions (ECF 26)

The Order specified that I should submit the Proposed Amended Complaint and declared the MTD moot / denied and denied the MfPSJ.

I. Reply (ECF 28) Supporting MfPSJ Submitted 10 Hours After Order

As I had just finished the Reply supporting the MfPSJ and Response Opposing the 56(d) Motion for Continuance, I noticed that an Order had been issued resolving the pending motions, but based only on AUSA Padis' Response. I submitted the Reply anticipating a Motion to Reconsider

J. Timely Motion to Reconsider Submitted (ECF 36)

As the Reply (ECF 28) was timely according to Local Rule 7.1 and had several

arguments of merit but was not reviewed by the court, the Motion to Reconsider was submitted so that, in particular, the court can rule on the statutory basis of 56d Motions which I contend are actually Rule 56 Responses.

II. Legal Standards

A. FRCP Rule 56

FRCP Rule 56 is the statute controlling Motions for Summary Judgment (MSJ) to include motions to resolve only a portion of the pending issues through a Motion for Partial Summary Judgment (MfPSJ). There is also FRCP Rule 56(d) paragraph which authorizes the court to defer decisions on the MSJ based on a mandatory affidavit of the respondent. However, there is no statutory 56(d) Motion for delay or continuance. Such motions are, in fact, the norm in this court and 5th Circuit Court, but in Third District Court there are only FRCP Rule 56(d) Responses which do not multiply the number of motions pending and delay resolution of the matters under consideration.

B. FRCP Rule 54(b) Motion to Reconsider

FRCP Rule 54(b) is the statute which gives the court broad powers to revise interlocutory decisions and is the statutory basis for Motions to Reconsider. In many courts it is often held that under normal circumstances a 54(b) Motion to Reconsider should be within 28 days which is the standard from FRCP Rule 59(e), though, obviously, extenuating circumstances can justify a longer time.[4]

Further, as the basis for the MfPSJ is four documents from USCIS already in the record, the lack of specificity in Defendants' FRCP Rule 56 Response Affidavit should be addressed by the court before any decision based on the merits of the

4 See widely cited Cook v. Flight Servs. & Sys., Inc., CIVIL ACTION NO: 16-15759 SECTION: "H" (E.D. La. Apr. 11, 2019).

MfPSJ itself.

C. Local Rule 7.1, Responses and Replies Within 21 and 14 Days

Local Rule 7.1 specifies the mechanics of motion practice within the court and provides 21 days for a normal response opposing a motion and 14 days for a reply supporting the motion.[5]

D. Local Rule 56.2(b) Limit on Number of MSJ

Local Rule 56.2(b) limits the number of MSJ a party may file to one but gives the court wide latitude to grant leave for additional MSJ's.[6]

E. Doctrine of Consular Non Reviewability (DoCNR)

As we intend to expand on existing challenges to the offensive (to us) Doctrine of Consular Non Reviewability (DoCNR) raised by USATXN relying on Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (citizen rights can bypass DoCNR), Patel v. Reno, 134 F.3d 929, 121 F.3d 1277 (9th Cir. 1997) (APA may override DoCNR), and Sandra Munoz v. State Department (9th Cir. 2022, 21-55365) (spouse of citizen is an exception to DoCNR) it is likely that this case will be appealed to the Fifth Circuit Court and it is plausible that it might be heard by the U.S. Supreme Court. The discrepancy concerning 56(d) Motions and 56(d) Responses between different circuit courts could be resolved by the Supreme Court.

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5 Local Rule 7.1 states: ...
(e) Time for Response and Brief. A response and brief to an opposed motion must be filed within 21 days from the date the motion is filed.
(f) Time for Reply Briefs. Unless otherwise directed by the presiding judge, a party who has filed an opposed motion may file a reply brief within 14 days from the date the response is filed.

6 LR 56.2 Limits on Time for Filing and Number of Motions.
(a) Time for Filing. Unless otherwise directed by the presiding judge, no motion for summary judgment may be filed within 90 days of the trial setting.
(b) Number. Unless otherwise directed by the presiding judge, or permitted by law, a party may file no more than one motion for summary judgment.

III. Argument and Authorities

A. Reply and Response (ECF 28) Was Timely (Sort Of)

As I had 14 days to Reply Supporting the MfPSJ (ECF 18) and 21 days to Respond to the improper 56(d) Motion, the submission in 5 days was timely according to Local Rule 7.1. However, as the submission was after the motions had been denied / granted, the court would not necessarily ever consider the matter and it would not necessarily be part of the record on appeal.

The Motion to Reconsider was also timely as it was submitted in 22 days after the Order (within 28 days which is normal guideline for such motions). The delay was primarily to insure that the Motion to Reconsider did not conflict with the court's Order that Defendants resubmit their Defendants' Motion to Dismiss (ECF 31 on 14 May 24).

In resolving the Motion to Reconsider, the court is asked to consider the 'timely' Reply and Response (ECF 28) allowing it to become part of the record in the event of any appeal.

A formal ruling on the statutory basis of 56(d) motions would be appreciated but is not essential as the improper 56(d) was granted without correction as a Rule 56(d) Response. I understand that within the scope of this court and 5th Circuit Court, 56(d) Motions are the norm, but within the 3rd Circuit Court, Rule 56(d) Responses are the norm and there is not the additional motion practice and inherent delays created by multiple motions.

As mentioned above it is likely that this matter will be appealed to 5th Circuit

Court concerning the applicability of DoCNR to citizen spouses as well as foreign nationals in general (are foreign nationals vermin not entitled to the rights of a person in the Fifth Amendment)[7] and the issue of 56(d) motions could potentially be referred to the Supreme Court for resolution between circuit courts as well.

B. Summary of Relief Sought Inaccurate, Should be Corrected

In AUSA Owen's Response (ECF 36) she argues that the correction to the language in the order is unwarranted. Of course I had explained the justification of the revised summary in my motion papers (ECF 32), but my concern was that the previous summary was outright false and was taken from AUSA Padis papers which were full of false and misleading statements. Indeed there is a separate Motion for Sanctions (ECF 30) pending against AUSA Padis over this complaint.

Further, in the previous decision (ECF 26) it appears that the court only really reviewed the first page of my Response and motions (ECF 18) which was an admittedly lengthy document (a hefty 59 pages with no table of contents or index). To rectify this error the court is asked to review:

- ECF 10-5 the USCIS Decision and Notice on 31 Jan **2023** (over one year ago) which approved my wife's ten year green card and citizenship.[8]
- The three USCIS documents which demonstrate that USCIS has left my in dire straits with no documentation of her legal status (see ECF 24-1, 18-6, 20-2) and an apparent 'undocumented alien' (a.k.a. an 'illegal').

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7 The Expanded DoJ Mission Statement includes:
> In carrying out its mission, the Department is guided by four core values: (1) equal justice under the law; (2) honesty and integrity; (3) commitment to excellence; and (4) **respect for the worth and dignity of each human being**.

8 USCIS ECF 10-5 states:
> We have approved your I-751, Petition to Remove Conditions on Residence. Our records also indicate we have approved your Form N-400 Application for Naturalization. Because we also approved your N-400, you will not receive a new Permanent Resident Card (also known as a Green Card). Instead, once you have taken the Oath of Allegiance, you will receive a Certificate of Naturalization, which will be proof of your U.S. citizenship.

- ECF 18 pages 30 to 32 about my wife's realistic fears of being deported at any time by ICE (she doesn't trust U.S. immigration), vigilantes (under Texas SB4), or National Guardsmen (on day one to deport millions of illegals who are poisoning the blood of our nation).
- ECF 18 pages 53 to 55 to demonstrate that Mrs. Von Kramer is seeking declaratory relief from the court to SSA that Mrs. Von Kramer was improperly prevented from visiting the United States in 2019, 2020 and 2021. She wanted to demonstrate her sincere desire to 'have an enduring and close attachment to the United States for at least 5 years' (a.k.a. SSA 'lawful presence' requirement). See the complaint ECF 29, page 48, relief 15.
- ECF 18 pages 56-57 shows Mrs. Carr is seeking proof of her permanent residence status until she can get the promised Certificate of Naturalization and a proper U.S. passport from DoS.

Having reviewed those documents the court can then reach whatever findings of fact it deems appropriate but I doubt that the court will conclude that the complaint can be summarized with 'attempts by Ms. Carr and Ms. Von Kramer to obtain immigration benefits' which is blatantly false and misleading.

C. Court Has Wide Options Under FRCP Rule 54(b)

FRCP Rule 54(b)gives the court an almost total ability to revise any and all interlocutory decisions and the court is asked to consider the following actions on its own initiative.

1. Include ECF 10-5 in the Findings of the Court

Given the refusal of USATXN to admit the existence of the crucial USCIS decision of 31 Jan **2023** (over a year ago)[9], include the text of that USCIS decision

9 AUSA Padis has had a copy of that document since 3 Mar 2024 and was made aware of my wife's plight at that time (ECF Doc28-1).

in its findings with a conclusion that USCIS approved my wife's ten year green card and citizenship.

2. Grant the Relief Sought in the Pending MfPSJ (ECF 33)

Given that USCIS has left my wife in dire circumstances, she should be provided her Certificate of Naturalization as well as a ten year green card until she can get a proper U.S. passport from DoS.

3. Grant the Additional Relief Sought in the Original MfPSJ (ECF 18)

Grant Mrs. Von Kramer's declaratory relief that she was improperly denied her ability to demonstrate 'her sincere desire to establish enduring ties to the U.S.' in 2019, 2020 and 2021. See SSA POM RS 02610.025 5-Year Residency Requirement for Alien Dependents / Survivors.

4. Grant Plaintiffs Leave to Submit Additional MfPSJ

The purpose Local Rule 56.2(b) is to prevent relitigation of the same issues ('two bites of the apple') but is not really applicable to MfPSJs which can simplify complex cases by eliminating issues as they are resolvable.

As such, the court could on its own initiative grant Plaintiffs leave to submit up to eight more MfPSJs (one for each remaining count, once the relief sought of declaratory relief to be provided to SSA is resolved) after an Answer is filed by the Defendants.

IV. Conclusion

This matter is surprisingly complex with many interesting nuances. While the court and AUSAs surely have an overwhelming case load, we seek the patience of the court in resolving these matters with prompt and just resolutions.

Respectfully submitted,

Verification of Reply

The Plaintiff hereby affirms under penalty of perjury in both the United States and Thailand that as an individual:

1. I have reviewed the above motion and believe all of the statements to be true to the best of my knowledge.
2. I have reviewed the associated documents and exhibits and believe them to be true and accurate copies with the exception of the documents identified as being redacted. The redacted documents have only been altered to remove sensitive personal information or other redactable information (as cited in the redaction) according to normal redaction procedures.

I hereby reaffirm that the above is true to the best of my knowledge under penalty of perjury in both the United States and Thailand.

/s *Brian P. Carr*
Brian P. Carr
1201 Brady Dr
Irving, TX 75061
Date: 13. Jun. 2024
Location: Irving, Texas

CERTIFICATE OF SERVICE

On the recorded date of submission, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I also hereby certify that on this same date no copies were served via U.S. mail as all parties in this matter were enrolled in the court's electronic case filing (and service) system.

/s *Brian P. Carr*
Brian P. Carr
1201 Brady Dr
Irving, TX 75061

Case, Statute, and Other Index

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BRIAN P. CARR, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	§ § § § § § § § § §	Case No. 3:23-cv-02875-S-BT

ORDER

Before the Court is Defendants' Motion to Strike, Deny, or Defer Consideration of Plaintiffs' Motion for Partial Summary Judgment and Brief in Support (ECF No. 37). Defendants ask the Court to deny Plaintiffs' Second Motion for Partial Summary Judgment (ECF No. 33) as premature or, in the alternative, to extend Defendants' response deadline until 60 days after a decision on Defendants' pending Motion to Dismiss. Mot. Strike 2.

Pro se Plaintiffs Brian P. Carr, Rueangrong Carr, and Buakhao Von Kramer bring this civil action against the United States of America and several federal agencies. Plaintiffs allege that Defendants have violated Plaintiffs' constitutional rights by thwarting various attempts by Ms. Carr and Ms. Von Kramer to obtain immigration benefits. *See* Am. Compl. (ECF No. 29). Before Defendants filed an answer or either party took any discovery, Plaintiffs previously filed a Motion for Summary Judgment (ECF No. 18), which Defendants moved to deny as moot.

Mot. Continue (ECF No. 22). The Court granted Defendants' motion and denied Plaintiffs' first Motion for Summary Judgment as premature, allowing Plaintiffs to amend their Complaint and Defendants to file an amended Motion to Dismiss. *See* Order (ECF No. 24). Plaintiffs filed their Amended Complaint within the deadline set by the Court, and Defendants then filed a Motion to Dismiss the Amended Complaint (ECF No. 31), which is currently pending before the Court. But shortly after, and despite the Court's previous Order explaining that Plaintiffs' first Motion for Summary Judgment was premature under the Federal Rules of Civil Procedure, Plaintiffs filed a Second Motion for Partial Summary Judgment (ECF No. 33). Now, Defendants again ask the Court to strike or deny Plaintiffs' Second Motion for Summary Judgment as premature and therefore moot. *See* Mot. Strike.

Federal Rule of Civil Procedure 56 governs motions for summary judgment, stating that "the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. But Rule 56(d) allows a court to "defer considering the motion [for summary judgment] or deny it" when "a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56(d)(1). Here, Defendants' counsel has attached a declaration stating that because Defendants have not yet sought discovery, "Defendants cannot at this time

present facts essential to justify its opposition to Plaintiffs' motion." *See* App'x 4 (ECF No. 38).

The Court reminds Plaintiffs that a motion for summary judgment may be proper in the future if the case progresses to discovery and Defendants, as the nonmovants, have access to facts essential to justify their opposition to such a motion. *See* Fed. R. Civ. P. 56(d). But a party is not permitted to seek discovery from any source before the parties have conferred as required by Rule 26(f). Fed. R. Civ. P. 26(d)(1). And Plaintiffs' status as *pro se* litigants does not exempt them from compliance with relevant rules of procedural and substantive law. *Clemons v. United States*, 2024 WL 2033304, at *1 (N.D. Tex. Apr. 22, 2024) (Rutherford, J.), *adopted by* 2024 WL 2032935 (N.D. Tex. May 7, 2024) (quoting *Wright v. LBA Hosp.*, 754 F. App'x 298, 300 (5th Cir. 2019) (per curiam)).

Given that the parties have not yet engaged in any discovery, Defendants have not yet served an answer, and Defendants' Motion to Dismiss is still pending, the Court again finds good cause to **GRANT** Defendants' Motion under Rule 56(d) and **DENY** Plaintiffs' Second Motion for Partial Summary Judgment as premature.

SO ORDERED.

June 14, 2024

REBECCA RUTHERFORD
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BRIAN P. CARR, RUEANGRONG CARR, and BUAKHAO VON KRAMER, Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	Civil Action No. 3:23-CV-02875-S-BT

DEFENDANTS' MOTION FOR LEAVE TO FILE
NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants respectfully request the Court's permission under Local Civil Rule 56.7 to file the attached Notice of Supplemental Authority. After Defendants filed their reply in support of their motion to dismiss on June 11, 2024, (Doc. 41), the Supreme Court of the United States issued its opinion in *Dep't. of State v. Muñoz*, 602 U.S. ---, No. 23–334, 2024 WL 3074425 (U.S. June 21, 2024). This opinion analyzes several relevant issues on which the parties here disagree, including (1) whether an executive officer's decision to deny a visa to a noncitizen is subject to review by the federal courts; and (2) whether a citizen has a liberty interest in their noncitizen spouse being admitted to the country sufficient to overcome the doctrine of consular nonreviewability.

Because *Muñoz* analyzes arguments similar to those raised by the parties in connection with Defendants' motion to dismiss, consideration of *Muñoz* as a supplemental authority may aid the Court in resolving the parties' arguments, and it

would not prejudice Plaintiffs. *See* Fed. R. App. P. 28(j). Therefore, Defendants request permission to apprise the Court of this new authority. *See also Highland Capital Mgmt. L.P. v. Bank of Am., N.A.*, No. 3:10-CV-1632-L, 2013 WL 4502789, at *28 (N.D. Tex. Aug. 23, 2013) (noting that under Local Civil Rule 56.7, where an authority is issued after briefing is complete, "the court will generally permit a party to file a notice of supplemental authority without seeking formal leave of court").

Relying by analogy on Federal Rule of Appellate Procedure 28(j), Defendants' proposed notice of supplemental authority does "not exceed 350 words." *See* Fed. R. App. P. 28(j). Thus, if this motion for leave is granted, Defendants respectfully request that Plaintiffs be granted leave to respond to the attached notice so long as Plaintiffs' response is "similarly limited." *Id.*

Respectfully submitted,

LEIGHA SIMONTON
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Attorneys for Defendants

CERTIFICATE OF CONFERENCE

On June 27, 2024, I conferred with pro se Plaintiff Brian Carr who stated that Plaintiffs are opposed to the requested relief.

/s/ Emily H. Owen
Emily H. Owen

CERTIFICATE OF SERVICE

On July 1, 2024, I electronically filed the above response with the clerk of court for the U.S. District Court, Northern District of Texas. I certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Emily H. Owen
Emily H. Owen

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BRIAN P. CARR, RUEANGRONG CARR, and BUAKHAO VON KRAMER, Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	Civil Action No. 3:23-CV-02875-S-BT

DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants submit as supplemental authority the attached opinion of the Supreme Court of the United States in *Dep't. of State v. Muñoz*, 602 U.S. ---, No. 23–334, 2024 WL 3074425 (U.S. June 21, 2024). There, in reversing the Ninth Circuit's denial of consular nonreviewability, the Supreme Court analyzed several issues pertinent to the controversy between the parties here. And on each issue, the Supreme Court's analysis supports the position advanced by Defendants. *See* Doc. 31, at 7-8.

Particularly, the court reaffirmed the validity of the doctrine of consular nonreviewability, noting that "[v]isa denials are insulated from judicial review by the doctrine of consular nonreviewability." *Muñoz*, at *5. As acknowledged by the court, the doctrine is subject to a "narrow exception" when "the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen." *Id*. at *7. Resolving an open question of constitutional law, the court held that "a citizen does not have a fundamental liberty

interest in [his] noncitizen spouse being admitted to the country." *Id*. at *8. And, relatedly, the court made clear that a citizen's independent constitutional rights do not entitle him "to a 'facially legitimate and bona fide reason' for why someone else's visa was denied." *Id*. at *18.

Respectfully submitted,

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UNITED STATES ATTORNEY

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/s/ Emily H. Owen